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IN THE

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Supreme Court of the United States

October Term, 1976

No. **76-716**

FRED FISHER, On Behalf Of Himself And On Behalf
Of All Other Persons Similarly Situated,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, Chicago,
Illinois,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented For Review	2
Statutes And Administrative Rulings Involved	3
Statement Of The Case	5
Reasons For Granting The Writ	10

I.

This Case Presents Important Questions Of Federal Law Arising Under §85 Of The National Bank Act, Title 12, United States Code, Affecting Iowa's Power To Regulate The Interest Rate Which An Illinois National Bank May Charge On Credit Card Loans Made To Iowa Residents, Which Have Not Been, But Should Be, Decided By This Court

10

- A. The Interest Rate Limitation On A Credit Card Loan Made To An Iowa Resident By Any National Bank Doing Business In Iowa Should Be The Same, Regardless Of Whether The Bank Is Located Within Or Without The State
- B. Section 85 Should Not Be Given A Tag Along Construction Which Would Permit A National Bank To Charge Iowa's Small Loan Interest Rate, A Rate Higher Than Iowa's Statutory Law Allows For Banks

10

12

ii.

Page

II.

The Court Of Appeals Has Construed §85, Title 12, United States Code In A Way That Conflicts With The Applicable Decisions Of This Court Which Have Consistently Recognized The Congressional Policy To Implement Competitive Equality Between State And National Banks In Construing The Provisions Of The National Bank Act 14

A. Section 85 Should Not Be Construed To Give A National Bank Located In Illinois Doing Business In Iowa An Unconscionable, Discriminatory, Competitive Advantage Over State And National Banks Located In Iowa 15

B. Section 85 Should Be Construed To Accommodate Compatible Iowa Legislation Regulating Interest Rates Which Competing National Banks Doing Business In Iowa May Charge 18

III.

The Decision Of The Court Of Appeals Rejecting Local Regulation Of National Bank Interest Rates Conflicts With The Decision Of Courts In Other Circuits 22

Conclusion 25

iii.

INDEX TO APPENDICES

Appendix

App. Page

- A. Opinion Of The Court Of Appeals Of July 29, 1976, 538 F.2d 1284..... A-1
- B. Opinion Of The District Court For The Northern District Of Illinois June 13, 1975.... B-1
- C. Opinion Of The Court Of Appeals For The Eighth Circuit, Burns v. American State Bank & Trust Co. and Fisher v. First National Bank of Chicago, April 20, 1973, 479 F.2d 26..... C-1
- D. Opinion Of The District Court For The District Of Nebraska Of June 26, 1975..... D-1
- E. Opinion Of The District Court of Iowa, In And For Polk County Of September 3, 1976 E-1
- F. Pertinent Text Of U. S. Code Sections Involved F-1
- G. Pertinent Text Of Iowa Statutes Involved.. G-1
- H. Pertinent Text Of Administrative Rulings Involved H-1

iv.

TABLE OF AUTHORITIES CITED

Cases

	Page
Acker v. Provident National Bank, 512 F.2d 729 (3 Cir. 1975)	13
Alden's, Inc. v. Packel, 524 F.2d 38, 48 (6 Cir. 1975)	10, 21, 24
Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973)	19
Burns v. American National Bank & Trust Co., 479 F.2d 26 (8 Cir. 1973)	7, C-1
DeCanas v. Bica, ——— U.S. ———, 96 S.Ct. 933, 937 (1976)	22
First National Bank in Mena v. Nowlin, 509 F.2d 872 (8 Cir. 1975)	13
First National Bank in Plant City, Florida v. Dickin- son, 396 U.S. 122, 131, 90 S.Ct. 337, 342, 24 L.Ed.2d 312 (1969)	16, 17
First National Bank of Logan v. Walker Bank & Trust Company, 385 U.S. 252, 261, 87 S.Ct. 492, 497	15, 16
Fisher v. First National Bank of Omaha, Opinion by Denney, J., June 26, 1975, District of Nebraska, CV-72-0-156; now on appeal to the 8 Circuit, No. 75-1976, submitted June 16, 1976	14, D-1
Haas v. Pittsburgh National Bank, 526 F.2d 1083, 1087 (3 Cir. 1976)	13
Illinois v. Continental Illinois National Bank & Trust Co. of Chicago, 536 F.2d 176 (7 Cir. 1976)	17
Independent Bankers Ass'n. of America v. Smith, 534 F.2d 921	12, 17
Meadowbrook National Bank v. Racile, 302 F.Supp. 62, 73-74 (La. 1969)	19, 22, 23

v.

Page

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 248 (1973)	19
North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973)	20
Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 861-864 (6 Cir 1972)	13
Radzanower v. Touche Ross & Co., ——— U.S. ———, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976)	22
San Diego Unions v. Garmon, 359 U.S. 236, 243, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959)	21
State of Iowa ex rel Richard C. Turner, Attorney General, Plaintiff, v. First of Omaha Service Corp- oration of Omaha, Nebraska, d/b/a BankAmeri- card, et al, Equity No. CE-3-1300, Harry Perkins, J., September 3, 1976	23, E-1
State ex rel Turner v. Younker Bros., Inc., 210 N.W. 2d 550, 556 (Iowa 1973)	20
Tiffany v. The National Bank of the State of Missouri, 85 U.S. 409, 21 L.Ed. 862 (1973)	11, 15
United Missouri Bank of Kansas City v. Danforth, 394 F.Supp. 774 (W.D.Mo. 1975)	14
Windham v. American Brands, Inc., 539 F.2d 1016 (4 Cir. 1976)	24

Miscellaneous

Ruling of the Comptroller of the Currency, 12 C.F.R. 7.7310	5, 8, H-1
--	-----------

Rules

Federal Rules of Civil Procedure, Rule 12(b)(6)	1
---	---

vi.
Statutes

	Page
United States Code, Title 12, §36(f)	3, 16, 17
United States Code, Title 12, §85	
..... 2, 3, 6, 7, 8, 9, 10, 12, 14, 15, 18, 19, 20, 21, 23, 25	
United States Code, Title 12, §86	4, 6, 7, F-1
United States Code, Title 12, §94	6, 7
United States Code, Title 15, §4	7
United States Code, Title 15, §15	7
United States Code, Title 15, §22	7
United States Code, Title 28, §1254(1)	2
United States Code, Title 28, §1331	6
United States Code, Title 28, §1332	6
United States Code, Title 28, §1337	7
United States Code, Title 28, §1343	6
United States Code, Title 28, §1406(α)	7
1971 Code of Iowa, §524.105(2)	4
1971 Code of Iowa, §524.906	4, G-1
1966 Code of Iowa, §529.2	4, G-1
1966 Code of Iowa, §529.6	5, G-4
1966 and 1971 Code of Iowa, §536.13(4) and (6)	5, G-6
1966 and 1971 Code of Iowa, §536.14	5, G-8
1966 and 1971 Code of Iowa, §536.15	5, G-9
1966 and 1971 Code of Iowa, §536.20	5, G-9

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Petitioner prays that a Writ of Certiorari issue to review the judgment herein in the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 29, 1976, timely Petition for Rehearing denied on August 31, 1976.

Opinion Below

The Opinion of the Court of Appeals is reported at 538 F.2d 1284 (1976). (Appendix A) It affirmed an Order dismissing the above-entitled cause for failure to state a claim upon which relief can be granted under F.R.C.P. 12(b)(6). The Memorandum Opinion and Order of the United States District Court, Northern District of Illinois, is unreported. (Appendix B)

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 29, 1976. A Petition for Rehearing with a suggestion for rehearing en banc was filed on August 12, 1976, and denied on August 31, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Is the maximum rate prescribed by the Iowa Banking Act for both state and national banks doing business in Iowa the applicable interest rate limitation under §85 of the National Bank Act, 12 U.S.C. 85, on credit card loans made to an Iowa resident by a national bank located in Illinois through correspondent banks located in Iowa?

2. Considering the fact that the Iowa Small Loan Law, as well as the Iowa Banking Act, expressly proscribes the making of small loans by a state or a national bank at the higher small loan interest rates, and the fact that the Iowa Small Loan Law expressly provides that neither a state nor a national bank can obtain, directly or indirectly, a small loan license or otherwise operate a small loan company, directly or indirectly, and the fact that the interest rate established for state and national banks by the Iowa Banking Act is higher than the interest rate allowed under Iowa's general usury laws, is the maximum interest rate which a national bank can legally charge on credit card loans to an Iowa resident limited under §85 of the National Bank Act, 12 U.S.C. 85, to the rate established for state and national banks under the Iowa Banking Act?

Statutes and Administrative Rulings Involved

1. United States Code, Title 12, Section 36(f); Act of February 25, 1927, c. 191, § 7, 44 Stat. 1228.

36. (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

2. United States Code, Title 12, Section 85; Act of June 3, 1864, c. 106, § 30, 13 Stat. 108; R. S. 5197; As Amended Act of June 16, 1933, c. 89, § 25, 48 Stat. 91; As Amended Act of August 23, 1935, c. 614, Title III, § 314, 49 Stat. 711.

85. *Rate of interest on loans, discounts, and purchases—* Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve banks in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political

subdivision where the branch is located. And the purchase, discount, or sale of bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

3. United States Code, Title 12, Section 86; Act of June 3, 1864, c. 106, § 30, 13 Stat. 108; R. S. 5198 (Reproduced at Appendix F).

4. Section 524.105(2), Code of Iowa, 1971 (Iowa Banking Act of 1969).

524.105 *Effect on existing banks.*

• • •

2. All state banks shall be subject to the provisions and requirements of this chapter in every particular, and all national banks, now or hereafter doing business in this state, shall be subject to the provisions of this chapter, to the extent applicable, from January 1, 1970.

(63GA, ch 273, §105)

Re-enactment of former §529.2, Code of Iowa, 1966 (Iowa Bank Installment Loan Law) (Reproduced at Appendix G).

5. Section 524.906, Code of Iowa, 1971 (Iowa Banking Act of 1969).

524.906 *Installment loans by State banks.*

1. A State bank may contract for and receive on any loan which is evidenced by a written agreement for repayment in installments, a charge, which shall include interest, determined in accordance with either of the following methods:

• • •

b. At a rate not to exceed one percent per month computed on unpaid principal balances. A state bank may receive such charge by crediting each installment whenever received, first to the charge at the monthly rate con-

tracted for and the remainder to principal until the loan is fully paid, or the state bank may compute the total charge which would be earned at the monthly rate contracted for if the loan were repaid according to its terms and each installment were applied first to the charge and then to principal, and include such total charge in the total amount of the loan. The terms of any loan for which a charge is made pursuant to this paragraph shall require substantially equal installments at successive intervals of not more than one month in amounts sufficient to amortize the entire loan, including charges, within the period ending on the date of its maturity which shall not exceed five years provided, however, that installments may be deferred or omitted on a seasonal basis. If the total charge is included in the total amount of the loan as provided for in this paragraph, a first interval of not less than fifteen nor more than forty-five days may be treated as a monthly interval.

(Entire text reproduced at Appendix G)

Re-enactment of former §529.6, Code of Iowa, 1966 (Iowa Bank Installment Loan Law) (Reproduced at Appendix G).

6. Sections 536.13(4) and (6), 536.14, 536.15 and 536.20, Code of Iowa, 1966 and 1971 (Chattel Loans a/k/a Small Loans) (Reproduced at Appendix G).

7. Ruling of the Comptroller of the Currency, 12 C.F.R. 7.7310 (Reproduced at Appendix H).

STATEMENT OF THE CASE

This case was commenced on September 3, 1971, in the United States District Court for the Southern District of Iowa. The complaint alleges the plaintiff, Fred Fisher, an Iowa resident, received an unsolicited credit card in the mail from the Defendant Illinois national bank. The name "Iowa State Bank & Trust Company, Iowa City, Iowa" was printed on the card. Plaintiff used the card to make purchases and to obtain a cash loan. Plaintiff brought the action as a

class action on behalf of credit card holders residing in Iowa holding credit cards issued by the Defendant, alleging that the Defendant violated federal law in that it charged usurious interest on credit card loans made to Iowa residents in violation of the National Bank Act, 12 U.S.C. §85. Defendant bank charges a rate of 18% per annum, which is legal for banks under the Illinois statutes, but it is an illegal usurious rate for state and national banks to charge under the Iowa statutes. Plaintiff alleges that the Iowa rate of interest is the rate adopted and established under the National Bank Act, 12 U.S.C. §85, for both instate and out-of-state national banks doing business in Iowa. The complaint prays for statutory penalties under 12 U.S.C. §86.

The complaint alleges jurisdiction under 12 U.S.C. §94. On February 18, 1972, the Defendant moved to dismiss on the ground that the Court lacked subject matter jurisdiction. On February 29, 1972, Plaintiff filed amendment to complaint alleging jurisdiction under 28 U.S.C. §1331 and §1332 based on the federal question and diversity, and the jurisdictional amount involved. On May 9, 1972, the District Court sustained Defendant's motion and dismissed the case for lack of subject matter jurisdiction.

On May 19, 1972, Plaintiff filed a motion to reconsider and a motion to file a second amendment to complaint. In the second amendment to complaint, Plaintiff, on the same facts, alleges a conspiracy between the Defendant bank and others to violate federal law, §85 of the National Bank Act, in violation of the Civil Rights Acts and the Antitrust Laws. Jurisdiction of the Civil Rights counts was alleged under 28 U.S.C. 1343, and of the Antitrust count under 28

U.S.C. 1337 and 15 U.S.C. 4 and 15. On June 14, 1972, the District Court denied the motion to reconsider, and on July 5, 1972, the District Court denied the motion to file the second amendment to complaint. The Plaintiff appealed the dismissal to the Court of Appeals for the Eighth Circuit.

The Eighth Circuit heard this case and another similar case together, en banc, and held that the National Bank Act was an act regulating commerce for the purposes of jurisdiction under 28 U.S.C. §1337, and therefore, the District Court had jurisdiction in cases arising under 12 U.S.C. §85 and §86, regardless of the amount in controversy. **Burns v. American National Bank & Trust Co.**, 479 F. 2d 26 (8 Cir. 1973) (Appendix C). The Eighth Circuit also directed the Iowa District Court, upon remand, to permit the filing of the second amendment to the complaint. 479 F.2d, at 30.

On November 4, 1971, prior to raising the jurisdictional issue, the Defendant had filed a motion to dismiss for improper venue. In a supporting affidavit filed after remand on August 6, 1973, the Defendant bank said that it currently has correspondent relationships with six banks in the State of Iowa which are under contract with the BankAmericard division of the Defendant bank, and that the six banks in turn have contractual relationships with the merchants located in the State of Iowa who have agreed to honor BankAmericard credit cards. On February 14, 1974, the District Court ruled that the Defendant's venue privilege under the National Bank Act, 12 U.S.C. 94, had priority over the Plaintiff's venue privilege under the Antitrust Laws, 15 U.S.C. 22, and transferred the case in its entirety to the Northern District of Illinois pursuant to 28 U.S.C. §1406(a).

After the transfer, Defendant, on May 2, 1974, moved to dismiss for failure to state a claim upon which relief could be granted. On May 29, 1975, the District Court in Chicago filed an order granting the motion and dismissed the entire case, which was followed by the Court's Memorandum and Opinion filed on June 13, 1975. The District Court said that §85 was silent on what rate the Illinois bank could charge Iowa residents, but "under such situation, the permissible rate would be defined by the laws of the state in which the borrower is situated". However, the District Court sustained the motion to dismiss on the grounds that §85 of the National Bank Act gave the Defendant bank "most favored lender" status which allowed the Defendant to charge Iowa's small loan interest rates on the credit card loans, in spite of the fact that Iowa's state banks could not charge such higher rates. The Court cited Ruling 7.7310 of the Comptroller of the Currency as supporting authority. Plaintiff filed his notice of appeal on June 27, 1975.

On July 29, 1976, the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court dismissing the case, but for different reasons. The Court of Appeals construed §85, and held it was not silent, rejecting the District Court's holding and reasoning that §85 was silent and that Iowa law applied in such situations. It also rejected the "most favored lender" status argument which the District Court relied on for its holding that Defendant could charge Iowa's small loan rates. Instead, the Court of Appeals construed the language of §85 as expressly enabling the State of Illinois to set the rate which the Defendant Illinois bank could charge on its credit

card loans made to Iowa residents. The Court of Appeals summarized its conclusions:

"We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to all loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."

The effect of the decision is to create a double standard, preferring the out-of-state national banks doing business in Iowa over both competing national banks in Iowa and competing state banks. The decision ignores the fact that out-of-state national banks doing business in Iowa compete with local national banks as well as local state banks.

The Court of Appeals did not consider the discriminatory effect of its decision against local national banks in favor of out-of-state national banks, a result completely at odds with the National Bank Act policy of competitive equality and the Constitutional guarantee of equal protection under law.

Moreover, the decision subjugates Iowa's statutory laws to Illinois' statutory laws within Iowa's geographical boundaries based on a nebulous construction of §85, a construction which ignores the many recent decisions of this Court to accommodate compatible state legislation to preserve the sensitive interrelationship between federal and state regulation of a subject matter.

The decision of the Court of Appeals is so at odds with the principles established by this Court, and establishes such an erroneous precedent for the District Court to follow that it requires correction.

REASONS FOR GRANTING THE WRIT

L

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW ARISING UNDER §85 OF THE NATIONAL BANK ACT, TITLE 12, UNITED STATES CODE, AFFECTING IOWA'S POWER TO REGULATE THE INTEREST RATE WHICH AN ILLINOIS NATIONAL BANK MAY CHARGE ON CREDIT CARD LOANS MADE TO IOWA RESIDENTS, WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. The interest rate limitation on a credit card loan made to an Iowa resident by any national bank doing business in Iowa should be the same, regardless of whether the bank is located within or without the state.

Laws pertaining to usury and interest rates on contracts have always been considered appropriate matters for local regulation. *Alden's, Inc. v. Packel*, 524 F.2d 38, 48 (6 Cir. 1975). Congress, in enacting the National Bank Act, deferred to local regulation in fixing the limitation on interest rates which national banks could charge, thereby continuing the traditional policy of local regulation of interest rates and establishing a policy of competitive equality between state and national banks. To implement its policy, Congress tied the national bank rate to the rate established by the general law of the state or the rate fixed for state banks, whichever was higher.

Parity was an important consideration. Congress intended there should be parity on interest rates as between competing national and state banks. It was expected that national banks "would come into competition with state banks, and it was intended to give them at least equal advantages in such competition." *Tiffany v. The National Bank of the State of Missouri*, 85 U.S. 409, 21 L.Ed. 862 (1973).

The decision of the Court of Appeals in this case is unprecedented and unsupportable. Its effect, if allowed to stand, would destroy competitive equality between national and state banks doing business in Iowa. More than that, it would even destroy the balance of competitive equality as between national banks by favoring foreign or out-of-state national banks doing business in Iowa over the national banks located in Iowa. It does this because it enables Illinois to export its statutory law on bank interest rates into Iowa. The incongruity and discrimination is obvious. Even if you disregard the competitive disadvantage the decision fosters on state banks, the decision establishes a double standard for national banks which cannot be justified because it allows preferential treatment to national banks located in a state where bank interest rates are higher or regulation nonexistent.

Considering that it was a credit card type of loan in this case and the fact that Defendant is a licensee or franchisee in the BankAmericard system, it would not be difficult for the BankAmericard organization to restructure the language of its license and franchise agreement in a manner so that all loans would be deemed made by a national bank in a nonregulated state. Obviously, that could and would frustrate

the efforts of any state to regulate interest rates for banks. Eventually, every state would be forced, as a practical matter, to eliminate interest rate limitations on bank loans in order that local state and national banks could compete with outsiders. The existence of such pressure on state legislatures to enact legislation to allow their state banks to meet such competition is more than theoretical. Several states reacted to that kind of pressure to allow their state banks to use off-premises electronic terminals in order to compete with national banks, a fact which was acknowledged by the Court in **Independent Bankers Ass'n. of America v. Smith**, 534 F.2d, at page 932-3, footnote 45.

B. Section 85 should not be given a tag along construction which would permit a national bank to charge Iowa's small loan interest rate, a rate higher than Iowa's statutory law allows for banks.

The Court of Appeals affirmed the decision of the District Court, but did so for different reasons. In the District Court, the Court held that Iowa law applied, but vitiated the effect of that decision by then holding that §85 allowed the Defendant bank to charge the highest rate any specialized lender in Iowa could charge. It found that the Iowa small loan rate was higher than Defendant's 18% rate. The District Court held Defendant was a "most favored lender" and that it could charge Iowa's small loan rates. Therefore, Defendant's rate was legal in Iowa! The District Court was concerned only with the rate, not the methods prescribed for computing interest, nor the contract terms applicable to the small loan type of loan.

The "most favored lender" concept was used in a different sense by the Court responsible for the un-

fortunate name. **First National Bank in Mena v. Nowlin**, 509 F.2d 872, 879-880 (8 Cir. 1975). In that case, the effective rate of interest charged by the national bank was held usurious because it was more than allowed to any state lender for that type of loan. The Eighth Circuit deliberately deferred comment on the issue of whether the national bank was limited to the rates allowed to a state bank or any special state lender. It said:

"The federal statute merely prevents state legislation which purports to give state banks or possibly any state lender advantages over national banks." 509 F.2d, at page 880. (Emphasis added)

Its use of the word "possibly" indicates the Court's recognition of the distinction, and its caution about premature comment on the issue.

Although the Court of Appeals in this case rejected the reasoning of the District Court, it did not do so expressly and unequivocally. The Court said:

"We agree with the District Court's conclusion dismissing the case for failure of the defendant bank to charge usurious interest, but not for entirely the same reasons." 538 F. 2d, at page 1288.

Further on, the Court of Appeals cited the cases, which it declined to follow, that held a national bank could charge the highest interest rates available to any specialized lender in the state. Those cases are:

Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855, 861-864 (6 Cir. 1972); **Acker v. Provident National Bank**, 512 F.2d 729 (3 Cir. 1975); **Haas v. Pittsburgh National Bank**, 526 F.2d 1083, 1087

(3 Cir. 1976); **United Missouri Bank of Kansas City v. Danforth**, 394 F. Supp. 774 (W.D.Mo. 1975). But then the Court again hedged its decision:

"On this same authority, we would probably be justified in affirming the District Court's order of dismissal on the basis of the Iowa 18% rate for the reasons the District Court gave."

The Court of Appeals should have clearly rejected that line of cases. Its failure to do so indicates the Court of Appeals may have considered the most favored lender status rule a sufficient alternate ground for affirming.

Petitioner directs this Court's attention to another case in the Eighth Circuit, which is now on appeal. In it, the District Court held that the most favored lender rule allowed a Nebraska national bank to charge Nebraska's installment loan rates in Iowa. **Fisher v. First National Bank of Omaha**, Opinion by Denney, J., June 26, 1975, District of Nebraska, CV-72-0-156; on appeal in the Eighth Circuit, No. 75-1976, submitted June 16, 1976. (Appendix D) The Petitioner is also plaintiff in that case.

II.

THE COURT OF APPEALS HAS CONSTRUED §85, TITLE 12, UNITED STATES CODE IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT WHICH HAVE CONSISTENTLY RECOGNIZED THE CONGRESSIONAL POLICY TO IMPLEMENT COMPETITIVE EQUALITY BETWEEN STATE AND NATIONAL BANKS IN CONSTRUING THE PROVISIONS OF THE NATIONAL BANK ACT.

A. Section 85 should not be construed to give a national bank located in Illinois doing business in Iowa an unconscionable, discriminatory, competitive advantage over state and national banks located in Iowa.

Section 85 of the National Bank Act makes the interest rates which national banks are allowed to charge a question of federal law. Congress recognized that national banks would compete with state banks and desired that national and state banks should be equal competitively in the rate of interest which they are allowed to charge in the respective states. To achieve their objective, Congress adopted the statutory law establishing interest rates for state banks in the respective states, and incorporated it by reference as part of the federal law. Section 85 is clearly enabling rather than restraining, and was intended to give national banks at least equal advantages which state banks may enjoy. **Tiffany v. The National Bank of the State of Missouri**, 85 U.S. 409, 21 L.Ed. 862 (1973).

The Congressional policy of competitive equality originated in 1864 when the National Bank Act was enacted, and was continued in 1927 when Congress enacted the Branch Banking Amendments. Recently, in **First National Bank of Logan v. Walker Bank & Trust Company**, 385 U.S. 252, 261, 87 S.Ct. 492, 497, this Court said:

"It appears clear from this resume of the legislative history of §36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned. *

* * To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864."

In the case of **First National Bank in Plant City, Florida v. Dickinson**, 396 U.S. 122, 131, 90 S.Ct. 337, 342, 24 L.Ed.2d 312 (1969), this Court said:

"At the outset we note that, while Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster 'competitive equality.' **Walker Bank**, 385 U.S., at 261, 87 S.Ct., at 497, 17 L.Ed.2d 343. State law has been utilized by Congress to provide certain guidelines to implement its legislative policy."

The decisions in those branch banking cases firmly establish competitive equality as the pole star to guide the Courts, not only in branch banking cases, but in other facets of the Act, here interest rates. Moreover, the branch banking cases have a particular significance in this case. The Defendant's credit card loans are a method by which it makes loans in competition with other banks in Iowa! Section 36(f), Title 12, defines a branch to include any place "at which deposits are received, or checks paid, or money lent" (emphasis added).

In the **Plant City** case, this Court held that the bank's armored car pick-up services was a method of making deposits making it a form of branch banking as the term is defined in 12 U.S.C. §36(f). Consequently, the

activity was subject to the state's regulation of the particular activity in the same way the state regulates its state banks. In line with that decision, the D. C. and Seventh Circuit Courts of Appeal held that an off-premises electronic bank facility which enables customers to make deposits, transfer funds, cash checks or obtain loans is a form of branch banking, making that activity subject to state regulation. **Independent Bankers Ass'n. of America v. Smith**, 534 F.2d 921 (D.C. Cir. 1976); **Illinois v. Continental Illinois National Bank & Trust Co. of Chicago**, 536 F.2d 176 (7 Cir. 1976).

A bank credit card is designed to enable the cardholder to obtain credit to make purchases of goods or services or to obtain cash advances. The credit card is used as a device by which the issuing bank makes a loan to a customer. The loan is made at the merchant's place of business where the purchase is made, or the correspondent or member bank where the cash advance is obtained. More often than not, that place is in a different location from where the card-issuing bank is located. Using the definition of the term branch as defined in 12 U.S.C. §36(f), the card-issuing bank is engaged in a form of branch banking.

Specifically, The First National Bank of Chicago operates its BankAmericard credit card plan in Iowa under contracts with national and state banks located, existing or doing business in Iowa. Whether or not the credit card method of making loans is a form of branch banking should be determined as a practical matter. This Court, in the **Plant City** case, eschewed semantical exercises which extol form over substance, a posture emphasized by the Court in the **Independent Bankers** case, 534 F.2d, at pages 942-4.

The policy of competitive equality ought not be aborted by a tortuous construction of §85 that cloaks the Defendant bank with a special immunity to Iowa's statutory laws limiting interest rates on all banks doing business in the state. The decision of the Court of Appeals, by allowing the Defendant national bank to charge higher Illinois rates on credit card loans to Iowa residents, cloaks the Illinois bank with a special immunity from Iowa's interest rate statutes, which gives it a substantial competitive advantage over competing Iowa national and state banks. The Court of Appeals ignored this Court's decisions, which were cited in Petitioner's briefs, emphasizing competitive equality in branch banking.

Furthermore, the decision does not consider the impact as between a foreign out-of-state national bank and a domestic local national bank. Its decision favoring the Illinois bank establishes an unconscionable and discriminatory competitive inequality between foreign and domestic national banks. That is so because the interest rate limitation for foreign national banks is the higher of the foreign or domestic rate, whereas for domestic national banks, the rate would be the domestic state bank rate! Because the decision so conflicts with the Congressional policy of competitive equality and this Court's decisions extolling that policy, the decision of the Court of Appeals should not be allowed to stand.

B. Section 85 should be construed to accommodate compatible Iowa legislation regulating interest rates which competing national banks doing business in Iowa may charge.

A Louisiana District Court found that §85 does not

expressly state what state's statutory interest rates apply to a national bank located in one state on a loan made in another state. Therefore, the Court held the bank rate is fixed by the laws of the state where it is doing business. **Meadowbrook National Bank v. Racile**, 302 F.Supp. 62, 73-74 (La. 1969). If Congress did not deal with the subject, basic Constitutional law teaches that the states have the power to regulate the subject under their police powers. In this case, Iowa, by statute, has exercised its reserved power to fix the rates of interest which state and national banks doing business in Iowa may charge. On the other hand, if §85 is enabling, Iowa has exercised the powers delegated to Iowa under the statute to fix interest rates inside its boundaries.

The holdings of this Court teach that federal law should not be deemed to have ousted or preempted state law in the absence of compelling reasons. Courts should not strain to give a federal statute a tortured construction that would preempt coordinate reasonable state regulation. **Askew v. American Waterways Operators, Inc.**, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973). Instead, the Courts should attempt to reconcile joint federal and state regulation of a subject matter and thereby preserve the sensitive interrelationship between federal and state regulation. This Court said, in **Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware**, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 248 (1973):

"So here, we may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be temp-

ered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'."

It is reasonable that Iowa regulate bank interest rates in Iowa. Iowa's coordinate regulation can readily be reconciled with §85. Yet, the Court of Appeals made no attempt to reconcile Iowa's regulation of bank interest rates in Iowa with §85, and it ignored the mandate of this Court in failing to do so.

This Court has also held that the state's statutory regulatory scheme should be given effect if the legislative choice is a valid exercise of the state's police power or reserved powers. It is sufficient if the legislative choice tends to operate to promote the public policy of the state, even though it may not be a perfect solution. **North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc.**, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed. 2d 379 (1973). Iowa does have a strong policy against usury which should be respected. **State ex rel Turner v. Younker Bros., Inc.**, 210 N.W.2d 550, 556 (Iowa 1973). The Court of Appeals cites no compelling reason why Iowa should not regulate interest rates in Iowa.

Considering the state of commerce in this nation at the time of the enactment of the National Bank Act in 1864, and the limitations on branch banking contained in the original Act, it is likely that Congress had little, if any, serious concern about a national bank competing with banks in another state. The Court of Appeals obviously thought otherwise. It is not possible, considering the original Act's limitations on branch banking, to find a Congressional intent that will support the Court of Appeals con-

struction of §85. Whatever concern Congress may have had about the rates a national bank could charge in another state would have been only a peripheral concern not articulated in §85. This Court said in **San Diego Unions v. Garmon**, 359 U.S. 236, 243, 79 S.Ct. 773, 779, 3 L.Ed. 2d 775 (1959):

"Due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the (federal regulation) . . ."

Iowa's regulation of bank interest rates within its boundaries is not inconsistent with §85. Section 85 defers to the states for regulation of interest rates. It does not expressly say which state laws shall be applied when a national bank in one state does business in another state. Regulation of interest rates has always been considered a matter appropriate for local regulation. **Alden's, Inc. v. Packel**, 524 F.2d 38, 48 (6 Cir. 1975). Iowa has a greater concern than Illinois in regulating usury and contract laws in Iowa. Notwithstanding, the decision of the Court of Appeals would make Illinois statutory law paramount in Iowa, a result that cannot be supported by precedent, common sense or reason. In fact, the Court of Appeals does not cite any precedent. Neither does it give any practical or common sense explanation for its decision. Instead, the Court of Appeals merely presumed that Congress intended to oust Iowa's authority to regulate interest rates which an out-of-state

Illinois national bank may charge in Iowa. This Court has instructed the lower Courts not to indulge in such a presumption. In **DeCanas v. Bica**, ——— U.S. ———, 96 S.Ct. 933, 937 (1976), this Court said:

"Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the I.N.A., intended to oust state authority to regulate the employment relationship covered by §2805(a) in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power - including state power to promulgate laws not in conflict with federal laws - was 'the clear and manifest purpose of Congress' would justify that conclusion."

In the absence of a clear mandate that Congress deliberately intended to preempt Iowa's power to regulate interest rates inside Iowa, the decision should not be allowed to stand. **Radzanower v. Touche Ross & Co.**, ——— U.S. ———, 96 S.Ct. 1989, 48 L.Ed. 2d 540 (1976).

III.

THE DECISION OF THE COURT OF APPEALS REJECTING LOCAL REGULATION OF NATIONAL BANK INTEREST RATES CONFLICTS WITH THE DECISION OF COURTS IN OTHER CIRCUITS.

The only other reported case in which the issue of local regulation was raised was in **Meadowbrook National Bank v. Racile**, 302 F.Supp 62 (E.D.La. 1969). That Court held that Louisiana law governed the interest rate which a national bank located in New York

may charge on a real estate mortgage loan in Louisiana. In construing the statute, the Court said:

"We hold that 12 U.S.C., §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another." 302 F.Supp. 62, 73-74.

Although the Court of Appeals could cite no authority opposing **Meadowbrook**, it declined to follow it.

The **Meadowbrook** case was followed by a State District Court in Iowa which held Iowa law governed the interest rate which the First National Bank of Omaha, a national bank located in Nebraska, may charge on BankAmericard loans made to Iowa residents. **State of Iowa ex rel Richard C. Turner, Attorney General, Plaintiff, v. First of Omaha Service Corporation of Omaha, Nebraska, d/b/a BankAmericard, et al**, Equity No. CE3-1300, Harry Perkins, J., September 3, 1976 (the Court's unpublished opinion is reproduced in the Appendix, Exhibit D). The Iowa Court reasoned:

"However, where national banks are making loans to residents of other states, a blind requirement that a national bank always is subject to the interest rate laws of the state of its domicile can defeat the policy of competitive equality rather than further it.

"As applied to Iowa, this policy would give national banks from states with higher interest rates than Iowa a competitive advantage. On the other hand, national banks located

in other states will impose a lower interest rate ceiling than does the state of Iowa would be put at a competitive disadvantage in making loans to Iowa residents."

In weighing Iowa's interest in this case with that of Illinois, the reasoning of the Court in **Alden's, Inc. v. Packel**, 524 F.2d 38, 47 (1975) is pertinent:

"The fundamental issue is whether the national interest in the free movement of money, credit, goods and services outweighs the valid local interest in restricting maximum interest rates on consumer 'loans' and setting uniform contract terms for such transactions. Before the emergence of a national currency and a national monetary policy, and especially before the emergence of national concern over consumer protection in interstate commerce, the issue would not have been seriously debated. But even in the period since these developments, no case that we have been referred to has even so much as hinted that usury laws and related contract laws do burden interstate commerce, and that the burden is increased by the lack of uniformity."

Those cases are the only ones to have considered the out-of-state versus the in-state issue. They support local regulation. No cases were found opposed to local regulation. Those cases are compelling authority because they apply the "equity of the statute." In other words, the decisions appeal to common sense, logic and legal precedent. **Windham v. American Brands, Inc.**, 539 F.2d. 1016 (4 Cir. 1976). The Court in that case said:

"As is sometimes said, there is beyond the law of the statute the equity of the statute: that is, the legislature has shown what policy it favors and this is a datum to be given great weight by the judiciary not only in the precise situations covered by the legislative act but in analogous situations where the judiciary has a freer hand but the policy considerations are similar to those in the area specifically covered by the legislative act." 539 F.2d, at page 1021.

The decision of the Court of Appeals ignores the equity of §85 to establish parity between state and national banks doing business in Iowa, and the decision should not be allowed to stand.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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INDEX TO APPENDICES

Appendix	App. Page
A. Opinion Of The Court Of Appeals Of July 29, 1976, 538 F.2d 1284.....	A-1
B. Opinion Of The District Court For The Northern District Of Illinois June 13, 1975....	B-1
C. Opinion Of The Court Of Appeals For The Eighth Circuit, Burns v. American State Bank & Trust Co. and Fisher v. First National Bank of Chicago, April 20, 1973, 479 F.2d 26.....	C-1
D. Opinion Of The District Court For The District Of Nebraska Of June 26, 1975.....	D-1
E. Opinion Of The District Court of Iowa, In And For Polk County Of September 3, 1976	E-1
F. Pertinent Text Of U. S. Code Sections Involved	F-1
G. Pertinent Text Of Iowa Statutes Involved..	G-1
H. Pertinent Text Of Administrative Rulings Involved	H-1

**In the
United States Court of Appeals
For the Seventh Circuit**

No. 75-1670

FRED FISHER,

Plaintiff-Appellant,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 74 C 489

WILLIAM J. LYNCH, *Judge.*

ARGUED FEBRUARY 12, 1976 — DECIDED JULY 29, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and SPRECHER,
Circuit Judges.

SPRECHER, *Circuit Judge.* The principal issue in this appeal is whether the interest rate charged by a national banking association with its principal place of business in Chicago in connection with the use of its bank credit cards by customers in Iowa, is governed by the 18% rate fixed by the Illinois Revolving Credit Act, by the 18% rate fixed for Iowa Small Loan Companies, by the 12% rate fixed for Iowa state banks or by the 9% rate fixed for persons generally in Iowa.

I

The plaintiff, Fred Fisher, brought this action in the district court for the Southern District of Iowa as a class

APPENDIX A

action on behalf of himself as well as on behalf of all other persons within the State of Iowa who were customers of the defendant's, The First National Bank of Chicago, FirstCard and BankAmericard credit card plans who had unpaid balances in their credit accounts within two years of the filing of his complaint on September 3, 1971, alleging that the defendant charged usurious interest. The complaint was based on two sections of the National Bank Act, 12 U.S.C. § 85, establishing rates of interest, and § 86, fixing penalties for usurious interest.

The defendant bank moved to dismiss the action on February 18, 1972, on the ground that jurisdiction over national banks is derived from 28 U.S.C. § 1348¹ and that under that section federal courts lack jurisdiction unless diversity or a federal question, as well as the jurisdictional amount, is pleaded under 28 U.S.C. § 1332 or § 1331.²

On May 9, 1972, the district court in Iowa sustained defendant's motion and dismissed the case on the basis of lack of subject matter jurisdiction. The Eighth Circuit Court of Appeals sitting *en banc* heard the *Fisher* case and another similar case, and concluded on April 20, 1973, that 28 U.S.C. § 1337,³ the commerce jurisdiction provision, which does not require a minimum jurisdictional amount or diversity, applies to and gives federal courts jurisdiction over all suits brought under specific provisions of the National Bank Act. The court said that "[i]t seems almost elementary that Congress regulates national banks primarily under the commerce clause, and that the National Bank Act, including 12 U.S.C. §§ 85 and 86, is an Act regulating commerce for purposes of § 1337." *Burns v. American National Bank and Trust Co.*, 479 F.2d 26, 29 (8th Cir. 1973).

¹ The last sentence of § 1348 reads: "All national banking associations shall, for the purposes of all . . . actions by or against them, be deemed citizens of the States in which they are respectively located."

² § 1332 requires diversity of citizenship and an amount in controversy in excess of \$10,000; § 1331 requires a federal question and an amount in controversy in excess of \$10,000; plaintiff's complaint alleged that the total amount of interest purported to be charged at usurious rates was \$97.30.

³ § 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

We consider the question of proper jurisdiction under § 1337 settled by the Eighth Circuit's opinion in *Burns v. American National Bank and Trust Co.*, *supra*, as part of the law of this case. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.404[8] at 531-537 (2d ed. 1974). In any event, the Eighth Circuit opinion appears to express the prevailing view. *Cupo v. Community National Bank & Trust Co.*, 438 F.2d 108 (2d Cir. 1971); *Brown v. First National City Bank*, 503 F.2d 114 (2d Cir. 1974); *Partain v. First National Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972); *Cosgrove v. First & Merchants National Bank*, 68 F.R.D. 555 (E.D. Va. 1975); *cf. State of Iowa v. First of Omaha Service Corp.*, 401 F. Supp. 439 (S.D. Iowa 1975).

The Eighth Circuit pointed out that plaintiff Fisher had originally failed to allege jurisdiction under 28 U.S.C. § 1337, but after the trial court had sustained defendant's motion to dismiss, the plaintiff moved to amend his complaint, charging that the defendant violated plaintiff's civil rights and violated the antitrust laws by charging usurious interest. In the antitrust count, the plaintiff expressly alleged that jurisdiction was based on § 1337. The Eighth Circuit directed the Iowa district court upon remand to permit the filing of the amendment to the complaint. 479 F.2d at 30.

II

Upon remand the Iowa district court allowed the amendment to be filed. There remained pending in the district court, however, the defendant's motion to dismiss for improper venue which it had filed on November 4, 1971, shortly after the original complaint had been filed. The defendant's motion was phrased in the alternative, to dismiss or transfer the cause.

On February 14, 1974, the district court for the Southern District of Iowa transferred the cause of action in its entirety to the Northern District of Illinois in accordance with 28 U.S.C. § 1406(a).⁴

⁴ As part of this appeal, the plaintiff has requested that the transfer order be vacated and reversed, and that the cause be sent back to Iowa. The same plaintiff brought a Truth in Lending Act complaint in the Southern District of Iowa against a different defendant, a national banking association established and having its principal place of business in Nebraska. The same district judge who transferred the present case

The venue provision of the National Bank Act provides that suits against national banking associations may be brought only in the federal court "within the district in which such association may be established" or in the state court "in the county in which said association is located," 12 U.S.C. § 94.⁶ The jurisdictional statute relating to national banking associations also uses both the terms "established" and "located." 28 U.S.C. § 1348. In *Cope v. Anderson*, 331 U.S. 461, 467 (1947), the Supreme Court in effect held that these terms are synonymous, saying:

For jurisdictional purposes, a national bank is a "citizen" of the state in which it is established or located, 28 U.S.C. § 41(16) [the predecessor of 28 U.S.C. § 1348], and in that district alone can it be sued. 12 U.S.C. § 94.

The Supreme Court construed the venue provision as recently as in *Radzanower v. Touche Ross & Co.*, 44 U.S.L.W. 4762 (U.S. June 7, 1976), where it held that venue in a suit against a national banking association charged with violating the Securities Exchange Act of 1934 is governed by § 94 rather than by the broad venue provision of the Securities Exchange Act and hence the suit could be brought only within the district where the association was established. The Court said:

Federal courts have consistently ruled that the place specified in a bank's charter as its home office is determinative of the district in which the bank is "established" for purposes of § 94. See, e.g., *Buffum*

⁶ (Continued)

to Illinois, transferred the other case to Nebraska. *Fisher v. First National Bank of Omaha*, 338 F. Supp. 525 (S.D. Iowa 1972). The plaintiff appealed the transfer of that case and the transfer of a usury case against the same national bank to Nebraska, but the Eighth Circuit dismissed the appeal *sua sponte* on the ground that transfer orders are interlocutory and nonappealable. *Fisher v. First National Bank of Omaha*, 466 F.2d 511 (8th Cir. 1972), a view accepted by virtually all jurisdictions. 9 J. Moore, *FEDERAL PRACTICE* ¶ 110.13[6] at 173 (2d ed. 1975). Therefore, we consider that the February 14, 1974 transfer order is properly part of this appeal.

⁷ Section 94 in its entirety reads:

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

v. Chase Nat. Bank, 192 F.2d 58, 60 (CA 7); *Leonardi v. Chase Nat. Bank*, 81 F.2d 19, 22 (CA 2).⁸
Id. at 4762, n.2.

Although the *Radzanower* language specifies only "established," not only does the *Cope* language indicate that "located" means the same thing⁹ but federal courts have also consistently ruled that the state in which the association is "located" as used in § 94 is the state in which the association's principal place of business is maintained. *Buffum v. Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944; *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943); *United States National Bank v. Hill*, 434 F.2d 1019, 1020 (9th Cir. 1970).

The First National Bank of Chicago is a national banking association. A national banking association is created by the making of an organization certificate, 12 U.S.C. § 22, which is filed with and recorded by the Comptroller of the Currency, § 23, who issues a certificate authorizing the association to commence the business of banking, § 27.

The organization certificate must "specifically state . . . [t]he place where [the association's] operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village," 12 U.S.C. § 22. Any national banking association "with the approval of the Comptroller of the Currency, may . . . change the location of the main office . . . within the limits of the city, town, or village in which it is situated" or with the Comptroller's approval

⁸ The *Buffum* language was:

A national bank is established within the meaning of this act only in the place where its principal office and place of business is as specified in its organization certificate. 192 F.2d at 60.

The *Leonardi* language was:

. . . [T]he district in which the national bank has its principal place of business and which contains the place recited in its charter . . . should be taken as the proper district for suits against a national bank. 81 F.2d at 22.

⁹ In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 561 (1963), the Court said: "All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state courts in the county where the banks are located."

and by a vote of shareholders owning two-thirds of the stock "may change the location of the main office . . . to any other location outside the limits of the city, town, or village in which it is located, but not more than thirty miles distant . . ." 12 U.S.C. § 30.

The First National Bank's location as specified in its charter or organization certificate is Chicago, Illinois, and the principal office of the association is located at One First National Plaza, Chicago, Illinois. These facts are established by the complaint which alleges that the bank "has its principal banking house at Chicago, Illinois" and by the uncontradicted affidavit of the bank's cashier. Furthermore the district court for the Southern District of Iowa ordered "this cause of action transferred [on the basis of the national banking association venue provision] in its entirety to the Northern District of Illinois where the defendant . . . is established."

The plaintiff's attack on the transfer order was based in the district court in Iowa upon the claim of repugnancy between the limited venue provision of § 94 of the National Bank Act, 12 U.S.C. § 94, and the broad venue provision of § 12 of the Clayton Act, 15 U.S.C. § 22. Exactly the same argument was rejected by the Supreme Court in *Radzower v. Touche Ross & Co.*, 44 U.S.L.W. 4762 (U.S. June 7, 1976), in the context of the broad venue provision of § 27 of the Securities Exchange Act, 15 U.S.C. § 78aa. The transfer of the case to the Northern District of Illinois was therefore proper and mandatory. We proceed to the merits.

III

The record in the transferred case arrived in the Northern District of Illinois on February 21, 1974. On May 2, 1974, the defendant bank filed a motion to dismiss for failure to state a claim upon which relief could be granted. On May 29, 1975, the district court in Chicago granted the motion and dismissed the entire action upon concluding that the defendant did not charge usurious interest. The court further found that "[i]nsofar as the alleged charging of usurious interest is the cornerstone of each of the remaining three counts of plaintiff's second amended complaint, the court finds that, in light of the

above holding, the three remaining counts [civil rights and antitrust] of the complaint must also be dismissed."

On June 13, 1975, the district court followed its dismissal order with a memorandum opinion which found and held that the interest rates which defendant may legally charge on loans are governed by 12 U.S.C. § 85; that defendant charged the plaintiff 18% per annum; that Illinois permits the charging of 18% per annum on the unpaid balance of debt incurred through a bank credit card; that Iowa allows the charging of 18% per annum on loans under \$1,000; that plaintiff never borrowed more than \$1,000 from the defendant at any one time; that defendant conducts its credit card business in Iowa with the help of Iowa correspondent state banks; and that state banks in Iowa are limited to charging .2% per annum. The district court stated in its memorandum opinion:

Although Section 85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this Court feels that under such situations the the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its "most-favored lender" status within the parameters of that state's laws.

[A ruling of the Comptroller of the Currency]* indicates that defendant is allowed to avail itself of the provisions of the Iowa Small Loans Act even if it does not comply with any of the provisions of that act other than the provisions relating to the interest rate.

* The Iowa district court in its transfer order of February 14, 1974 voiced a similar conclusion when it said that "the usury or fundamental count must be tried in the Northern District of Illinois and public policy would be strengthened by ordering this case to be tried there in its entirety."

* The ruling of the Comptroller of the Currency provides that:

"(a) A national bank may charge interest at the maximum rate permitted by State law to any competing State chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed."

12 C.F.R. § 7.7310.

Accordingly, it is the finding of this Court that the National Banking Act grants to the defendant a "most favored lender" status when it extends credit to borrowers in Iowa. Therefore, defendant could avail itself of the provisions of the Iowa Small Loans Act even though Iowa state banks could not. The logical extension of this finding is that defendant did not charge a usurious rate of interest on the loans it made to plaintiff.

We agree with the district court's conclusion dismissing the case for failure of the defendant bank to charge usurious interest, but not for entirely the same reasons.

IV

The facts of this case require us to interpret the following language of the statute determining the rate of interest chargeable by national banking associations, 12 U.S.C. § 85:¹⁰

¹⁰ Section 85 in its entirety reads:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of \$25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District *where the bank is located*, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for *associations organized or existing in any such State* under this chapter. (Emphasis added.)

Our task is twofold: first, what rate of interest is authorized by the state "where the bank is located" and what state is that; and second, what effect does the exception have upon "associations organized or existing in any such State" and what state is that?

From our prior discussion in Part II of 12 U.S.C. § 94, the national banking association venue provision, and the *Radzanower* case, there can certainly be no lingering doubt as to the meaning of "where the bank is located." None of the cases indicate that Congress gave one meaning to "locate" in § 94 and another meaning to the same word in § 85. The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest "allowed by the laws of the State" of Illinois. If we could stop there and only look at the first portion of § 85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, ILL. REV. STAT., ch. 74, § 4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on "any loan or discount made" as being governed by the laws of the single state where the national bank can be located.

The applicability of the Illinois 18% Act to the defendant within Illinois has not been questioned in these

¹⁰ (Continued)

the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

proceedings. The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. What causes difficulty is the language of the "except" phrase which follows.

In 1873, when the Supreme Court decided *Tiffany v. National Bank of Missouri*, 85 U.S. 409, the exception read as it does today except that it applied to "associations organized in any such State" instead of to "associations organized or existing in any such State" as it now reads. In that case, the laws of Missouri allowed 10% interest to be charged by all persons except state banks, which were only allowed to charge 8%. A national banking association organized in Missouri charged 9% which was alleged to be usurious. In holding that the national bank could lawfully charge 10%, the Supreme Court said:

There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than 10 per cent. National banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words "no more" than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more," as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. . . . Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their exis-

tence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites.

Id. at 412-413.

The Eighth Circuit has recognized that the *Tiffany* case construed § 85 to place national banks in a position of limited advantage over state banks by allowing them to charge interest at the highest rate applicable under state law to lenders generally and not necessarily at the rate applicable to state banks, which might be lower, that is the so-called "most favored lender status." *First National Bank in Mena v. Nowlin*, 509 F.2d 872, 879-880 (8th Cir. 1975); *United Missouri Bank of Kansas v. Danforth*, 394 F. Supp. 774, 779 (W.D. Mo. 1975).

Several cases have extended the *Tiffany* "most favored lender status" to include the type of small loan or revolving credit card laws which are involved in this case. In other words, *Tiffany* has not been restricted to interpreting the first words of § 85 as applying to state rates established for "natural persons" and the exception to permit to a national bank a comparable state bank rate which is higher than the highest state rate allowed to natural persons. The courts have interpreted the allowance clause and the exception together to permit national banking associations to charge the highest rate charged by any person or entity in the state under like conditions. *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855, 861-864 (6th Cir. 1972); *Acker v. Provident National Bank*, 512 F.2d 729 (3d Cir. 1975); *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1087 (3d Cir. 1976); *United Missouri Bank of Kansas City v. Danforth*, 394 F. Supp. 774 (W.D. Mo. 1975). Under this authority, the Illinois 18% rate would, of course, apply to the defendant's business in Illinois.

On this same authority, we would probably be justified in affirming the district court's order of dismissal on the basis of the Iowa 18% rate for the reasons the district court gave:

Although Section 85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this court feels under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated.

The same view was also taken in *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62, 73-74 (E.D. La. 1969), where the court expressed it with some misgivings:

In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located.

The court concluded however:

We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another.

Id. at 75.

We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on "any loan" is governed by the rate allowed by the state "where the bank is located," which in this case is Illinois. After *Tiffany* was decided the exception was amended by Congress to apply it not only to associations "organized in any such State," which would be redundant inasmuch as the first clause applies to the same state, that is, where the bank is located, but to apply the exception also to

associations "organized or existing in any such State."¹¹ In this case the defendant bank appears to "exist" in Iowa, although in our view of the case we need not determine whether it does or not.

We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is "existing"¹² in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa.

For these reasons, we affirm the judgment of dismissal of the district court.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

¹¹ The *Tiffany* language appeared in the National Bank Act of June 3, 1864, 13 Stat. 99 (so quoted by the Supreme Court as late as *Farmers' and Mechanics' Bank v. Dearing*, 91 U.S. 29, 31 (1875)). The addition of "or existing" appeared shortly thereafter in the Revised Statutes of 1878 in § 5197 and seems to have been first so quoted in *National Bank v. Johnson*, 104 U.S. 271 (1881).

¹² *Central National Bank v. Continental Casualty Co.*, 182 F.2d 407, 409 (7th Cir. 1950):

"Existing" has an ordinary meaning of "the fact, or state, of being or living."

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FRED FISHER,

Plaintiff,

v.

THE FIRST NATIONAL BANK
OF CHICAGO,

Defendant.

NO. 74 C 489

MEMORANDUM OPINION AND ORDER

The original complaint filed in this action contained the allegation that defendant had charged the plaintiff, a BankAmericard holder, usurious interest on his BankAmericard account in violation of Section 85 of the National Bank Act, 12 U.S.C., Section 85. The complaint sought statutory damages as prescribed in 12 U.S.C., Section 86. Plaintiff also sought to represent a class consisting of all defendant's cardholders who were residents of Iowa and who had an unpaid balance in their account within two years of the date on which the complaint was filed.

Plaintiff eventually filed a second amended complaint containing three new counts. Count II alleges that by charging usurious interest defendant violated plaintiff's civil rights in violation of 28 U.S.C., Section 1983. Plaintiff alleges in Count IV that defendant acted in restraint of trade, in contravention of 15 U.S.C., Section 1 et seq. by conspiring to charge usurious interest rates in Iowa. Plaintiff seeks to represent

APPENDIX B

a class within the parameters of each new count and is seeking both damages and injunctive relief thereunder.

The defendant has filed a motion to dismiss the complaint, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted.

The activities of defendant, which is a national banking association, are governed by a regulatory scheme contained in the National Bank Act, 12 U.S.C., Section 1 et seq. The interest rates which defendant may legally charge on loans made by it are governed by 12 U.S.C., Section 85 which reads, in pertinent part:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.

Defendant argues that the complaint fails to state a claim upon which relief can be granted because the rate of interest that was charged against plaintiff was not usurious. Defendant contends that there are several reasons to support its argument.

Defendant argues that since Section 85 of the National Bank Act allows national banks to charge the interest rate allowed by the laws of the state where the bank is located, and because defendant is located in the State of Illinois, that the law of Illinois will control. Illinois Revised Statute, chapter 74, section 4.2 allows an interest charge of 1 ½ per cent per month on the unpaid balance of the debt incurred through the use of a credit card such as the BankAmericard used by plaintiff. Defendant charged the plaintiff at the interest rate of 1 ½ per cent per month. Therefore, defendant argues that its actions are governed by Section 85 and that it has in no way violated that section.

Defendant argues alternatively that its rate of interest was not usurious even if Iowa law, rather than Illinois law, applies. This argument is based upon the Iowa Small Loan Law, Code of Iowa, Ch. 56, sec. 13(4). This section allows lenders to charge interest at the rate of 1 ½ per cent per month on the unpaid balance of any loan not exceeding one thousand dollars. Plaintiff never borrowed more than one thousand dollars from defendant at any time. Defendant argues that a national bank may charge the rate of interest allowed any competing lender and, therefore, even under Iowa law, it was perfectly legal for defendant to charge plaintiff the rate of interest it did.

Defendant also argues that if Section 85 is not applicable principles of conflicts of laws would lead to a validation of its interest rates.

Plaintiff argues, in opposition to the motion to dismiss, that Section 85 is applicable but that the particular part of Section 85 relating to the law of the state

where the bank is located is inapplicable. Plaintiff contends that the part of Section 85 relating to banks which are organized or exist in a state where a special rate of interest may be charged by state banks is the pertinent part of Section 85.

Plaintiff argues that defendant conducts its Bank-Americard business with the help of correspondent Iowa banks and that such banks must be considered agents of defendant. Therefore, as plaintiff argues, the correspondent Iowa banks are agents of defendant and that defendant "exists" where its agents exist. Plaintiff then asserts that the provisions of Section 85 indicate that national banks that merely "exist" in a state, rather than national banks which are located in that state, can charge a rate of interest no higher than a state bank could charge. It is pointed out that state banks in Iowa were limited to a charge of 12 per cent annual interest on their loans and could not avail themselves of the Iowa Small Loans Act referred to above. Therefore, it is argued that defendant's charge of 18 per cent annual interest was usurious under Section 85 of the National Bank Act. Plaintiff concludes that since Iowa state banks could not take advantage of the Iowa Small Loan Act, neither could defendant.

This Court does not agree with plaintiff's argument to the effect that the import of Section 85 is to put national banks which make loans to people living in states other than where the banks are geographically located on the exact same footing as state banks chartered under the laws of the state where the borrower resides.

The Sixth Circuit Court of Appeals has noted that:

"The legislative history of this statute [12 U.S.C. Section 85] indicates a Congressional intent to give national banks special competitive advantages over state banks, by permitting national banks to charge interest at the highest rate available to lenders generally in each respective state

Indeed, an amendment to Section 30 (the predecessor to the present Section 85) of the Act, designed to put national banks on precisely the same footing with the state banks so far as this matter of taking interest is concerned, was expressly rejected by the Senate."

Northway Lanes v. Hackley Union National Bank & Trust Co., 464 F.2d 855 at 861-862. (6th Cir. 1972).

In **Tiffany v. National Bank of Missouri**, 85 U.S. 409 (1873), the Supreme Court held that national banks would not be restricted to the rate of interest provided for state banks of issue where other lenders were allowed by state law to charge a higher rate of interest. A close reading of the **Tiffany** decision indicates that the Supreme Court did not consider the clause of Section 30 relating to national banks organized in a given state in the same light as plaintiff. The decision indicates that this clause does not set up a separate category predicated upon the place of doing business as plaintiff suggests. The decision indicates that the Court felt that this clause served only to indicate that if state banks of issue were allowed to charge a higher rate of interest than lenders in general, the same privilege would be allowed to national banks. 85 U.S. at 411. The following excerpt from the decision is conclusive on this question:

"It speaks of allowances to National banks and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more," as they were added to the preceding clause of the Section. The absence of those words, or words equivalent, is significant." 85 U.S. at 412.

It is apparent to this Court that the purpose of the provisions of Section 85 was to put national banks, as far as interest is concerned, in as good a position as the most favored lender operating in the state in which the bank is located. **First National Bank In Mena v. Nowlin**, 374 F. Supp. 1037 (E.D.Ark. 1974).

This Court can find no authority which would limit a national bank's "most favored lender" status to the state in which it is located. It is apparent that the intent of the National Banking Act was to bestow a "most favored lender" status upon national banking associations wherever they might incur competition from other financial institutions in the lending of funds. When this principle is accepted the defendant's argument that the law of the state where the national bank is located controls in all situations becomes less cogent. This is so because, under the rule suggested by defendant, a national bank could not be competitive if it attempted to extend credit to a borrower in a state with less stringent usury laws

than the state where the national bank was located.

Although Section 85 is silent as to the permissible rate of interest on loans made to borrowers situated in states other than where the national bank is located, this Court feels that under such situations the permissible rate would be defined by the laws of the state in which the borrower is situated. However, a national bank making such a loan would retain its "most favored lender" status within the parameters of that state's laws.

A ruling of the Comptroller of the Currency indicates that:

"(a) A National bank may charge interest at the maximum rate permitted by State law to any competing State chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject to the provisions of State law relating to such class loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed."

The above ruling indicates that defendant is allowed to avail itself of the provisions of the Iowa Small Loans Act even if it does not comply with any of the provisions of that act other than the provisions relating to the interest rate.

Accordingly, it is the finding of this Court that

the National Banking Act grants to the defendant a "most favored lender" status when it extends credit to borrowers in Iowa. Therefore, defendant could avail itself of the provisions of the Iowa Small Loans Act even though Iowa state banks could not. The logical extension of this finding is that defendant did not charge a usurious rate of interest on the loans it made to plaintiff. Therefore, Count I of plaintiff's complaint seeking statutory damages for a violation of 12 U.S.C., Section 85 is hereby dismissed.

As to the remaining counts of the complaint, the Court finds that dismissal of Count I mandates the dismissal of Counts II, III, and IV. This finding is based upon a recognition that each of the remaining counts is founded upon the assertion that defendant was charging a usurious rate of interest. This is true of both counts based on alleged violations of the civil rights laws as well as the count based on the alleged violation of the Sherman Act. Because the plaintiff's allegations in these counts were founded on the contention that defendant was charging usurious interest, and the Court has found that defendant did not so charge, the Court deems the dismissal of these counts appropriate without further discussion of the viability of those claims.

Accordingly, the plaintiff's entire second amended complaint is hereby dismissed.

/s/ William J. Lynch
Judge, United States District Court

Dated: June 13, 1975

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 72-1135

Thos. F. Burns, on Behalf of Him-
self and on Behalf of All Other
Persons Similarly Situated,
Appellant,

vs.

American National Bank and
Trust Company, a National
Banking Association,
Appellee.

Appeal from the
United States Dis-
trict Court for the
District of Minne-
sota, Third Divi-
sion.

No. 72-1507

Fred Fisher, on Behalf of Himself
and on Behalf of All Other Per-
sons Similarly Situated,
Appellant,

vs.

The First National Bank of Chi-
cago, Chicago, Illinois,
Appellee.

Appeal from the
United States Dis-
trict Court for the
Southern District
of Iowa.

Submitted: March 12, 1973.

Filed: April 20, 1973.

APPENDIX C

Before MATTHES, Chief Judge, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS, and STEPHENSON, Circuit Judges.

Ross, Circuit Judge.

These cases present identical jurisdictional questions under provisions of the National Bank Act. Both *Burns* and *Fisher* brought an action in federal court against a national bank seeking to recover usury penalties for themselves and for other members of their class, under 12 U.S.C. §§ 85 and 86. In both cases the defendant bank filed a motion to dismiss on the ground that the court lacked subject matter jurisdiction. These motions were sustained and the cases were dismissed by the trial courts on the ground that under 28 U.S.C. § 1348 federal courts do not have jurisdiction over actions brought against national banks by individuals unless diversity or a federal question, as well as the jurisdictional amount, is pleaded under 28 U.S.C. § 1332 or § 1331.

Both of these cases were originally heard by panels of this Court. In *Burns*, which was submitted October 19, 1972, and decided December 27, 1972, a divided panel affirmed the trial court's determination that it lacked subject matter jurisdiction under 28 U.S.C. § 1348. On January 9, 1973, a different panel of this Court heard the *Fisher* case, and on January 15, 1973, orders were entered in both cases granting a combined *en banc* hearing.

We hold that jurisdiction may be founded on 28 U.S.C. § 1337, and reverse and remand for further proceedings.

Section 1348 provides as follows:

"The district courts shall have original jurisdiction of any civil action commenced by the United States, or

by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

The principal question here is the proper interpretation of the final sentence of this section. The banks claim that this shows an intention of Congress to eliminate federal jurisdiction over suits against national banks except under 28 U.S.C. §§ 1331 or 1332; and appellants claim that this section was intended only to eliminate the right of national banks to claim original or removal jurisdiction *solely* on the basis of being a nationally chartered corporation. We adopt the latter view.

Originally Congress provided that national banks could only be sued in federal court. However, Congress later adopted § 4 of the Act of July 12, 1882, which provided:

" '[T]he jurisdiction for suits hereafter brought by or against any association . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.' " *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565 (1963).

Section 1348 was derived from the Act of March 3, 1887, which reenacted § 4 of the 1882 Act in modified form. As the Supreme Court stated in *Mercantile National Bank v. Langdeau*, *supra*, 371 U.S. at 565-566,

“[§] 4 of the 1882 Act and the 1887 Act were designed to overcome the effect of §§ 563 and 629 Rev. Stat. which allowed national banks to sue and be sued in federal district and circuit courts solely because they were national banks, without regard to diversity, amount in controversy or the existence of a federal question in the usual sense. Section 4 apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.

“Decisions of this Court have recognized that § 4 purported to deal with no more than matters of federal jurisdiction. As we observed in *Continental National Bank v. Buford*, 191 U.S. 119, 123-124:

“The necessary effect of this legislation was to make national banks . . . citizens of the States in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the Circuit Courts of the United States simply on the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result.” (Footnotes omitted.)

In *Herrmann v. Edwards*, 238 U.S. 107 (1915), the Supreme Court held that there was no federal jurisdiction in a suit against directors of a national bank for wrong-

doing and breach of trust. But the Court made clear that there was nothing alleged in the complaint upon which to base jurisdiction except the allegation that the defendant was a national bank. The Supreme Court analyzed the predecessor statute to § 1348 as follows:

“Under the provisions of the Act of 1882 long prior to their reenactment in 1888 it had been conclusively established that because a corporation was a national bank created under an act of Congress gave it no greater right to remove a case than if it had been organized under a state law. *Leather Manufacturers' Bank v. Cooper*, 120 U.S. 778.” *Id.* at *14.

At first glance *Herrmann*, *Buford*, and *Cooper* do seem to stand for the proposition that absent jurisdiction under §§ 1331, 1332 or 1348, there can be no jurisdiction. However, it should be noted that in those cases jurisdiction was claimed simply on the basis of the fact that a national bank was involved. Moreover, jurisdiction under an act regulating commerce, 28 U.S.C. § 1337, was not even provided for until 1911, subsequent to all of these decisions except *Herrmann*. Therefore, the Supreme Court did not have the advantage of this additional jurisdictional provision when it decided those cases.

In *Cupo v. Community National Bank & Trust Co.*, 438 F.2d 108, 110 (2nd Cir. 1971), the Second Circuit disposed of the argument that 28 U.S.C. § 1348 precludes jurisdiction in actions under another section of the National Bank Act, 12 U.S.C. § 61, in these words:

“Defendants urge this court to reject the holding in *Murphy*, contending that that holding is in direct conflict with the Congressional policy behind the enact-

ment of 28 U.S.C. §§ 1348 and 1349. We reject this contention. It appears reasonably clear that section 1348 was designed to grant federal jurisdiction in certain limited situations involving winding up of the affairs of the national banks and to establish citizenship for diversity purposes in cases where federal court jurisdiction is based on diversity of citizenship. Cf. *Austin v. Altman*, 332 F.2d 273, 276 (2d Cir. 1964). The last sentence of the provision clearly indicates that Congress contemplated other common law actions involving national banks being brought in the federal courts only where diversity of citizenship exists, but in no way negates federal jurisdiction under grants such as section 1337. See also, 12 U.S.C. § 94, regulating venue. Thus section 1348 cannot be read as implying that *only* the actions enumerated in that section can be brought in federal court. Since the claim in this case establishes the existence of an independent federal question on the basis of the alleged violation of 12 U.S.C. § 61, section 1348 is no bar." (Footnotes omitted.)

In our opinion, § 1348, like its predecessor statutes, was intended to eliminate the right of national banks to claim original or removal jurisdiction *solely* on the basis of being a nationally chartered corporation, and was *not* intended to eliminate jurisdiction in all suits involving national banks except those actions specifically permitted in the first paragraph thereof.

The district court in *Burns* held that jurisdiction in cases involving national banks may be founded in §§ 1331 and 1332 as well as § 1348 where the prerequisites of those sections are met. It is inconsistent, however, to recognize jurisdiction where there is a federal question, as contem-

plated in § 1331, yet deny it where there is a more specific federal question arising from the commerce clause. The sole question thus becomes whether or not the sections of the National Bank Act relating to usury, 12 U.S.C. §§ 85 and 86, properly come within the classification of an "Act of Congress regulating commerce." 28 U.S.C. § 1337.¹

Section 85 limits the amount of interest which can lawfully be charged by a national bank to the interest allowed by the state wherein the bank is located. To this extent, it places national banks upon the same competitive footing as state banks having their place of business within the same state. But § 86 provides that in cases where usurious interest is charged, recovery may be had against a national bank in double the amount of the interest paid, and it sets a two-year period within which the action for recovery must be commenced. Congress has thus imposed upon national banks a penalty provision that may be different from those imposed by the individual states on state banks in two significant ways. The enforcement of that penalty provision is the basis for the action in those cases.

It seems almost elementary that Congress regulates national banks primarily under the commerce clause, and that the National Bank Act, including 12 U.S.C. §§ 85 and 86, is an Act regulating commerce for purposes of § 1337.

"It is true that federal regulation of finance is not grounded in the commerce power alone. As Chief Justice Hughes explained in *Norman v. B. & O. R.R.*, 294 U.S. 240, 303, 55 S.Ct. 407, 414, 79 L.Ed. 885 (1935):

¹ Section 1337 provides as follows:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers.

See also *McCulloch v. State of Maryland*, 17 U.S. (4 Wheat.) 316, 406, 4 L.Ed. 579 (1819). But to found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one." *Murphy v. Colonial Federal Savings and Loan Association*, 388 F.2d 609, 615 (2nd Cir. 1967).

See also *Partain v. First National Bank of Montgomery*, 467 F.2d 167, 172 (5th Cir. 1972); *Cupo v. Community National Bank & Trust Co.*, *supra*, 438 F.2d at 110.

The Fifth Circuit has joined the Second Circuit in holding that 28 U.S.C. § 1337 gives federal courts jurisdiction in suits brought under specific provisions of the National Bank Act. In *Partain v. First National Bank of Montgomery*, *supra*, 467 F.2d at 167, the plaintiff brought suit under 12 U.S.C. §§ 85 and 86 (as did both Burns and Fisher) and the Fifth Circuit held that jurisdiction was established under § 1337.

We hold therefore that the district courts had jurisdiction in each of these cases under § 1337. In view of this

holding, we do not reach the question of whether or not there is also jurisdiction under 28 U.S.C. § 1355 which gives the district courts original jurisdiction of any action for recovery of a fine or penalty incurred under any Act of Congress. Neither do we reach the question of whether or not these suits were properly brought as class actions.

Fisher originally failed to allege jurisdiction under 28 U.S.C. § 1337. After the trial court sustained defendant's motion to dismiss, Fisher moved to amend his complaint to include such an allegation. The trial court declined to permit the amendment stating as follows:

"This finding does not rest upon the court's general discretion to disallow amendments, but upon the court's conclusion that the amended complaint would be subject to dismissal as not stating a cause of action upon which relief could be granted. Authorities cited by defendant hold there is no need for the court to indulge in 'futile gestures' under such circumstances."

(In its original ruling the trial court considered and rejected the argument that jurisdiction was established under 28 U.S.C. § 1337.) Upon remand the trial court is directed to permit the filing of the "Second Amendment to Complaint" filed in the district court on May 19, 1972.

Both cases are reversed and remanded for further proceedings consistent with the views expressed in this opinion.

BRIGHT, Circuit Judge, with whom MEHAFFY, Circuit Judge, joins, dissenting.

We dissent. The jurisdictional question is whether federal courts should entertain federal usury claims for less

than \$10,000 against national banks in nondiversity suits. In our view, 28 U.S.C. §1348 precludes federal jurisdiction under 28 U.S.C. §1337 in these suits.¹

Section 1348 contains two parts; a first paragraph granting federal jurisdiction in certain specific controversies relating to national banks (winding up affairs and actions to enjoin Comptroller of the Currency), and a second paragraph restrictive of other actions. This second paragraph provides:

All national banking associations shall for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

The majority have agreed with appellants' argument that the present actions may be brought in federal court pursuant to 28 U.S.C. §1337 as suits arising under an Act of Congress regulating commerce since the National Bank Act constitutes a regulation of national banks under the commerce power. The majority conclude that the restrictive jurisdictional effect of §1348 "[1] was intended to eliminate the right of national banks to claim original or removal jurisdiction *solely* on the basis of being a nationally chartered corporation, and [2] was *not* intended to eliminate jurisdiction in all suits involving national banks except those actions specifically permitted in the first paragraph [of §1348]." Majority opinion, *supra*, at . . . While we agree with the second aspect of this conclusion, we do not believe that the jurisdictional impact of §1348 was intended to be as limited as the majority suggest.

¹ The majority holds only that §1348 is no bar to these suits involving national banks being brought in federal court under 28 U.S.C. §1337, a special jurisdictional statute extending the purview of the federal courts to cases arising under an act of Congress regulating commerce. We address our dissent to this limited holding.

As we understand the position of the appellee-banks, they would concede federal jurisdiction in suits in which national banks are parties where, under similar circumstances, an action in federal court might lie against a state chartered bank. These suits would include actions involving federal questions or diversity of citizenship and for an amount in excess of \$10,000 under 28 U.S.C. §§ 1331 and 1332.

Additionally, jurisdiction would certainly lie against either state or national banks pursuant to §1337 where the gist of the action alleged monopolistic practices in violation of the Sherman Act or the Clayton Act, which are acts of Congress "• • • protecting trade and commerce against restraints and monopolies." Moreover, other federal statutes which apply equally to business operations of both state and federal banks afford litigants the right to sue these institutions in federal court. Examples include provisions of the Fair Labor Standards Act, 29 U.S.C. §216(b), and of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f).²

The Supreme Court, in *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 559-560, 565 (1963), noted that initially national banks probably could be sued only in federal courts. But in 1864 Congress authorized concurrent jurisdiction in certain state courts. Concurrent juris-

² In *Continental National Bank v. Buford*, 191 U.S. 119, 124 (1903), the Supreme Court recognized the right to invoke jurisdiction under existing jurisdictional statutes of general application despite the enactment of predecessor provisions to §1348. The Court said:

Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its Federal origin, and as a citizen of the State in which it was located, the right to invoke the original jurisdiction of the Circuit Court in any suit involving the required amount, and which, by reason of its subject matter, and not by reason simply of the Federal origin of the bank, was a suit arising under the Constitution or laws of the United States.

diction existed until the enactment of §4 of the Act of July 12, 1882, ch. 290, 22 Stat. 162, the predecessor to §1348, which enactment restricted the federal jurisdiction over national banks. A proviso to §4 of this Act read:

“[T]he jurisdiction for suits hereafter brought by or against any association . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.” [*Mercantile National Bank, supra*, 371 U.S. at 565 (footnote omitted).]

The Court observed:

Section 4 apparently sought to limit, with exceptions, the access of national banks to, and their suitability in, the federal courts to the same extent to which non-national banks are so limited. [*Id.* at 566 (footnote omitted).]

Elaborating on the legislative intent underlying §4, the Court stated:

The proviso to §4 of the 1882 Act first appeared as an amendment offered on the floor of the House by Representative Hammond, pursuant to the order of the House fixing the assignment of the bill H.R. 4167 as a special order. * * * Mr. Hammond succinctly stated the purpose of his amendment as follows: “My amendment, therefore, declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank actually doing or which might be doing business by its side; that they shall be one and the same.” * * * Mr. Robin-

son then asked, “As I understand the gentleman’s proposed amendment, it is simply to this effect, that a national bank doing business within a certain State shall be subject for all purposes of jurisdiction to precisely the same regulations to which a State bank, if organized there, would be subject.” Mr. Hammond replied, “That is all.” * * *. [*Id.* n.22 (citations omitted).]

Since the passage of this 1882 Act, the Supreme Court has consistently denied access to federal courts in suits against national banks not coming within the jurisdictional requirements of 28 U.S.C. §§ 1331, 1332, or 1348, and their predecessor provisions. See, e.g., *Leather Manufacturers’ Bank v. Cooper*, 120 U.S. 778 (1887); *Whittemore v. Amoskeag National Bank*, 134 U.S. 527 (1890); *Herrmann v. Edwards*, 238 U.S. 107 (1915). Cf. *Continental National Bank v. Buford*, 191 U.S. 119 (1903).

In *Leather Manufacturers’*, the Supreme Court construed the effect of §4 of the Act of July 12, 1882, as follows:

[The Act] provided in clear and unmistakable terms that the courts of the United States should not have jurisdiction of such suits thereafter brought, save in a few classes of cases, unless they would have jurisdiction under like circumstances of suits by or against a state bank doing business in the same state with the national bank. The provision is not that no such suit shall be brought by or against such a national bank in a Federal court, but that a Federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there, for jurisdiction of such suits has been taken away, unless

a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States. [120 U.S. at 781.]

In *Whittemore*, plaintiff had sought to hinge federal jurisdiction on provisions of the National Bank Act which authorized criminal prosecution and a civil action by the Comptroller of the Currency for forfeiture of a banking franchise. The circuit court dismissed on nonjurisdictional grounds. The Supreme Court reversed and directed that the case be dismissed for lack of jurisdiction.

In a subsequent comment on its *Whittemore* decision, the Court in *Herrmann* noted:

• • • [T]his court concluding that the Act of 1882 excluded jurisdiction as a Federal court, the action of the court below in dismissing for want of compliance with the Equity Rule was reversed and the case remanded with directions to dismiss for want of jurisdiction as a Federal court. Of course this conclusion involved deciding that in the absence of a Federal controversy concerning the interpretation of some provision of the National Bank Act raising what might be considered by analogy a Federal question in the sense of §709, Rev. Stat., a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law, afforded no basis for jurisdiction. Indeed, that this conception was the

one upon which the decision was rested is shown by the fact that in the course of the opinion it was pointed out that neither the provisions of § 5209, Rev. Stat., providing for criminal punishment of directors of national banks in certain cases, nor § 5239, Rev. Stat., giving certain powers to the Comptroller of the Currency in certain instances, were involved in the cause of action so as to give rise to a Federal question upon which the jurisdiction could be based. [238 U.S. 112-13.]

In short, the congressional history and the interpretation given this history by the Supreme Court furnish persuasive authority that Congress sought to restrict federal court jurisdiction in suits by or against national banks to the same extent that state banks or parties suing state banks are denied jurisdiction.

Here, limitation of the allowable rate of interest which a bank may charge represents a basic regulation common to both state and federal banking laws. The federal usury law is grounded in state regulation, for §85 of the National Bank Act permits a national bank to charge interest "at the rate allowed by the laws of the State • • •." Access to federal courts would be denied appellants if they had brought similar actions against state banks under state law. To permit appellants access to federal court in the instant cases violates the strong congressional policy underlying §1348 that state and national banks be treated alike under similar circumstances for jurisdictional purposes. Thus, we would reject §1337 as a jurisdictional basis for these actions.

In so concluding, we note that the jurisdictional significance of §1337 has been greatly expanded since its en-

actment in 1911, *Murphy v. Colonial Federal Savings and Loan Ass'n*, 388 F.2d 609, 614-15 (2d Cir. 1967). The jurisdictionally restrictive provisions culminating in §1348, however, were enacted and subsequently interpreted by the Supreme Court against the backdrop of then existing provisions of the National Bank Act including the usury sections derived from the Act of June 3, 1864, ch. 106, §30, 13 Stat. 108. Under these circumstances, we think it extremely doubtful that Congress in later enacting §1337 intended a modification of the existing specific jurisdictional provisions governing national banks.

Absent some direction from Congress or an additional pronouncement from the Supreme Court, and in light of the ever mounting caseloads of the federal courts, we are reluctant to extend our jurisdiction to controversies involving national banks, which appear to have been generally and satisfactorily handled by state courts for over 90 years.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRED FISHER,

Plaintiff,

vs

FIRST NATIONAL BANK OF
OMAHA, Omaha, Nebraska,

Defendant.

CIVIL NO. 72-0-156

MEMORANDUM

APPEARANCES: For Plaintiff - Everett Meeker,
of Washington, Iowa
For Defendant - William E. Morrow, Jr.,
of Omaha, Nebraska

DENNEY, District Judge

This matter comes before the Court upon the cross motions for summary judgment filed on behalf of each party to this action. [Plaintiff's motion was filed on March 17, 1975 (Filing #52) and the defendant's on March 26, 1975 (Filing #59)]. The Court granted each side an opportunity to present oral argument on April 18, 1975. At that time, brief recitations highlighting the critical factors in this matter were tendered.

The Court has painstakingly examined each brief submitted on this matter and has also analyzed each document, affidavit and deposition produced. Upon such review, the Court finds that there are no genuine issues of material fact residing within this case and that such cause of action is appropriate for adjudi-

APPENDIX D

cation by summary judgment. Pursuant to Rule 52(a) of Fed.R.Civ.P., this Court has the discretion to render decisions on motions for summary judgment in the absence of a documentation of findings of fact and conclusions of law. However, where the Court has deemed it necessary, such findings and conclusions have been enounced herein.

JURISDICTION

Jurisdiction in this case has been derived from 15 U.S.C. § 1640(e), which provides that any action for civil liability due to a failure to disclose information required in "Credit Transactions" (15 U.S.C. §§ 1631-1644 and Regulation "Z" 12 C.F.R. 226) may be brought within the "appropriate" United States District Court. **Fisher v. First Nat. Bank of Omaha**, 338 F.Supp. 525 (D.C. Ia. 1972), appeal dismissed 466 F.2d 511 (8th Cir. 1972) [Division I of the Complaint, Filing #1].

The Court further takes cognizance of the Plaintiff's claim asserting usury and recognizes the original jurisdiction vested in district courts for the recovery of a penalty incurred under any Act of Congress. 12 U.S.C. §§ 85, 86, 28 U.S.C. § 1355. [Division II of the Amendment to Complaint, Filing #4]. Jurisdiction is further derived from the provisions of 28 U.S.C. §§1337, 1355 and 15 U.S.C. 15, embracing the allegations based upon violations of the antitrust laws, [Division III of the Amendment to Complaint, Filing #4]. Lastly, jurisdiction has been derived under the provision of 28 U.S.C. §1343 embracing the alleged violations of the plaintiff's civil rights. 42 U.S.C. §§1983, 1985(3). [Divisions IV and V of the Amendment to Complaint, Filing #4].

The judicial scrutiny of this Court has been directed

to the first two divisions of the plaintiff's complaint as being the critical aspects of this action. Divisions III through V, while being pled in good faith, clearly fail to state meritorious causes of action upon which relief shall be granted.

INTRODUCTORY FACTS

The plaintiff accepted a BankAmericard on March 31, 1969, and used the card on this date and on several occasions thereafter. In July, 1969, the plaintiff received a printed form entitled "Legal Notice Federal Reserve Regulation Z Customer Credit Cost Disclosure" [Ex. 42 and 45.4]. The defendant mailed to the plaintiff periodic statements as displayed in Exhibits Nos. 45.1 to 45.24 for the periods encompassing the months of April, 1969, to March, 1971.

DIVISION I - DISCLOSURE REQUIRED IN "CREDIT TRANSACTIONS"

A matter of preliminary importance which was belatedly injected into this case on March 17, 1975, almost three and one-half years after the commencement of this action on **September 3, 1971**, and two years after the defendant's answer on July 2, 1973 [Filing #18], is the defense of the one year statute of limitations provided within 15 U.S.C. §1640(e). In conjunction therewith, the defendant asserts that at the latest delinquency collection procedures were instituted against the plaintiff in **July, 1970**. Under 12 C.F.R. §226.7(b), a creditor extending open end consumer credit as stipulated herein must provide its customers with a periodic statement "except in the case of an account which the creditor deems to be uncollectible or with respect to which delinquency collection

procedures have been instituted." It is the defendant's assertion that any complaint alleging violations of Regulation Z on the periodic statements must be filed within one year from the date that collection procedures were "instituted" or, in this case, by July, 1971; otherwise, the complaint is based on periodic statements that were not required to be sent to this customer.

On two independent bases, each of which is sufficient in itself to avoid this defense, the Court finds that the plaintiff's claim as delineated in Division I of his Complaint is not barred by the statute of limitations. [1] This defense, for whatever merit it may exhibit, has been waived. Rule 12(h), Fed.R.Civ.P. [2] The defendant has admitted in its answer that it sent monthly periodic statements through the month of February, 1971, to the plaintiff. Such periodic statements indicate the impositions of a finance charge and payments having been made. 12 C.F.R. §226.7(b) requires the creditor to send a periodic statement in any period during which a finance charge is imposed. The actions of the defendant in "stimulating" the plaintiff by phone requesting regular payment is not the institution of delinquency collection procedures, in light of the fact that periodic statements through February, 1971, were sent to the plaintiff clearly indicating that finance charges had accrued against his account. It is noted that the March, 1971, periodic statement [Ex. 45.24] shows the minimum amount due in payment as being the whole amount due BankAmericard with no finance charge having accrued against the plaintiff since the February, 1971, periodic statement. The record only supports this Court's conclusion that as of March, 1971, the BankAmericard account of Fred

Fisher was deemed to be uncollectible. No delinquency collection procedures as contemplated by this section had been "instituted" prior to this time. For the purposes of this Memorandum, the Court will therefore consider the herein mentioned defense as having been waived with regard to "all" alleged violations.

The ultimate question residing within Division I of the allegations is whether the defendant's Regulation Z notice and periodic statements for the period alleged were in compliance with Regulation Z and the Truth in Lending Act.

Upon examination of the legal notice directed to the plaintiff in July, 1969, encompassing consumer credit cost disclosure, it is this Court's determination that such notice did not comply with the directives of 12 C.F.R. §226.7. The magnitude of such noncompliance is exhibited in the failure to inform the customer that the previous balance will be determined "without first deducting credits and payments executed during the billing cycle." C.F.R. §226.7(b)(8). Such infraction defies the spirit and purpose of Regulation Z.

The adamant attitude displayed by the defendant in asserting compliance with Regulation Z in the construction and disclosure of the periodic statements has mystified this Court at several junctures in its analysis of the plaintiff's delineated claims of violation. While 12 C.F.R. §226.6 does not prescribe the size of print to be utilized for the terms "finance charge" and "annual percentage rate", such regulation clearly states that "they shall be printed more conspicuously than other terminology." Thinly underlining such terms, while maintaining adjacent terms

in the same print with no color or silhouette distinction, is not **printing** such terms in a conspicuous fashion. Any other construction on this point prohibits the effectuation of the purposes of the Truth in Lending Act and Regulation Z. The case of **Powers v. Sims & Levin Brothers**, 387 F.Supp. 1237, 1242, 1243 (D.C. Va. 1975) is clear on this exact point:

Where the act and regulations require creditors to use the terms "finance charge" and "annual percentage rate," those terms must be "printed more conspicuously than other terminology required by [Regulation Z]." 12 C.F.R. §226(a). The terms "finance charge" and "annual percentage rate" were clearly intended to be the most important disclosures required by their act and implementing regulations, and their importance was to be signified by their being printed in print more conspicuous than that used for any other disclosures.

Defendant's "Disclosure Statement of Loan" fails to give these two terms the prominence and importance required by §226.6(a) and, therefore, fails to comply on its face with the mandate of the regulation. Defendant has printed the terms "finance charges [sic]" and "annual percentage rate" in **all caps**. Defendant has, likewise, printed the term "total payments," a disclosure required by §226.8(b), and the terms "interest," "brokerage," and "payments" in **all caps**.

Defendant contends that its having underlined the term "finance charges [sic]" underscores that word's prominence and brings it into substantial compliance with the regulation. The regulation does not, however, state that its requirement

that the terms "finance charge" and "annual percentage rate" be given special prominence on the disclosure statement can be satisfied by underlining; it states explicitly that those two terms must be printed in print more conspicuous than any other disclosure required to be made. Since there is no dispute that the defendant failed to print the terms "finance charge" and "annual percentage rate" in print more conspicuous than used for any other disclosures, summary judgment shall be granted for plaintiffs on this issue.

Further indicia of the defendant's woefully deficient compliance with Regulation Z appears on the backside of the periodic statement where the defendant did not use ten point type size for the numeral characters appearing as the percentage rate, and range of amounts to which they are applicable. 12 C.F.R. §226.6(a).

Also, on the backside of each periodic statement, the defendant has used the word "service charge" in the absence of any definition for such term and, in fact, in juxtaposition with the term "finance charge." The use of this term is inconsistent and clearly misleads and confuses a customer. 12 C.F.R. §226.6(c).

On the final point of this Court's inquiry, the defendant has conceded that it used improper terminology under the regulation with respect to its use of the term of "current balance" on the front of the periodic statement instead of utilizing the term "new balance" as demanded by 12 C.F.R. §226.7(b)(9).

The magnitude of the defendant's noncompliance with Regulation Z and the Truth in Lending Act demand that relief be granted. While the defendant

in this action **may** have acted in good faith, its acts were, nevertheless, intentionally done and not made by mistake. **Johnson v. Associates Finance, Inc.**, 369 F.Supp. 1121, 1124 (S.D. Ill. 1974). They were by no means bona fide errors. 15 U.S.C. §1640(c). Due to such noncompliance on the BankAmericard periodic statement, the plaintiff is entitled to one recovery in the amount of twice the finance charge for the period July 1, 1969, through February, 1971; twice such finance charges amount to \$291.84. [2 x \$145.92 = \$291.84; Ex. #42]. **Willis v. American National Stores**, 350 F.Supp. 173 (N.D. Ga. 1971).

DIVISION II PLAINTIFF'S CLAIM OF USURY

The legal question residing within this claim is whether the credit and cash advances made by the defendant under its BankAmericard Plan are made and payable only at its place of business in the city of Omaha, Douglas County, Nebraska.

Exhibit 45.1 displays the agreement between the customer and the lender:

I understand that I may, by use of my BankAmericard, issue drafts upon you for acceptance by you at Omaha, Nebraska. I agree that when you accept such drafts you may charge my BankAmericard therefor. I further agree to pay my BankAmericard account to you at Omaha, Nebraska.

The deposition of Bill Henry, Vice-President of the First National Bank of Omaha and Manager of First of Omaha Service Corporation, filed on May 1, 1972, recounts on pages four and five how the use of a BankAmericard operates:

At this point the customer made a decision if he wanted to use it. If he did, he takes it to a merchant, in which the merchant creates a draft — a three-party draft. The merchant accumulates these drafts, puts them into what we call a "hetter" (sic) envelope," takes these to his local bank, and these are handled just like checks. He's given credit for them in his commercial checking account. That agent bank has a checking account with the First National Bank of Omaha, and along with other items, they receive what is called in our industry "clear through the proof transit function." They submit those to us with a cash letter for deposit in their account with us. The items in turn are then submitted to the BankAmericard Department, where they are charged to the customer's account. Then, based on the cycle billing of that customer, anywhere from within one to thirty days, his "statement," as we call it, will be cut off, and all charges received and charges made to his account within the last thirty days will be rendered in the form of a statement of account, which will be mailed to him at his residence, be it Nebraska, Iowa, South Dakota, New York, or any place. The statement goes out with a return envelope headed up to the BankAmericard Center, P. O. Box 3128, Omaha, Nebraska, **upon receipt of which we cash his check and credit his account.** (Emphasis supplied).

The BankAmericard draft functionally operates and is treated the same as a draft by check on a personal account.

A customer using this "lender credit card" (U.C.C.C. §1.301(9) for analogy purposes only) communicates or

indicates his intention to establish the credit card arrangement with BankAmericard when the lender, through banking channels, receives in the State of Nebraska the draft of the customer. It is therefore this Court's determination in this case that the extension of credit occurs in Omaha, Nebraska.

This determination hereby renders the plaintiff's allegation that the defendant is engaged in making usurious loans in Iowa moot. The interest rate-finance charge extracted by BankAmericard from its customers is clearly a lawful rate within the State of Nebraska. Neb. Rev. Stat. §45-137 (1943); 12 U.S.C. §85; *Northern Lanes v. Hackley Union National Bank & Trust Company*, 464 F.2d 855, 861 (6th Cir. 1972); *United Missouri Bank of Kansas City, N.A. v. Hon. John C. Danforth*, No. 75-CV-38-C (W.D. Mo filed April 29, 1975, considering which state rate is applicable to credit card transactions.)

DIVISION III - ALLEGATIONS OF "PRICE FIXING IN VIOLATION OF THE SHERMAN ANTI-TRUST ACT, 15 U.S.C. §1

The plaintiff contends the "charging of usury is a method to fix the price or rate of interest, and as such it is a 'price fixing' violation which is treated as a 'per se' violation of §1 of the Sherman Act. (Citations omitted)." [Pages 23 and 24 of plaintiff's trial brief and brief in support of motion for summary judgment.] Such a contention is clearly unsupported by the facts and the law.

There is competition in the bank credit card business between the individual member banks of the system on the merchant and cardholders level and between the systems themselves in

association of the member banks. There are no territorial limits or exclusive dealers within the bank credit card business. National BankAmericard Incorporated can best be described as a joint venture among member banks which produces an identifiable product, BankAmericard. BankAmericard can only function through its member banks and the card could not operate without a central organizational unit or member banks.

Worthen Bank and Trust Co. v. National BankAmericard, Inc., 345 F.Supp. 1309 (E.D. Ark. 1972).

DIVISIONS IV AND V - CIVIL RIGHTS

The plaintiff's final allegations, based upon 42 U.S.C. §§1983 and 1985(3), have failed to state a claim upon which relief can be granted and are hereby summarily disposed of, due to a failure to show or prove state action. *Wallach v. Connor*, 375 F.2d 557, 561 (8th Cir. 1966); *Collins v. Hardyman*, 341 U.S. 651, 656, 71 S.Ct. 937, 939, 95 L.Ed. 1253 (1951).

An Order is filed contemporaneously herewith, in accordance with the determinations delineated herein.

Dated this 24th day of June, 1975.

IN THE DISTRICT COURT OF THE STATE
OF IOWA IN AND FOR POLK COUNTY

STATE OF IOWA ex rel
RICHARD C. TURNER,
ATTORNEY GENERAL,
Plaintiff,

v.

FIRST OF OMAHA SERVICE
CORPORATION of Omaha,
Nebraska d/b/a
BANK AMERICARD, and
CENTRAL NATIONAL BANK
& TRUST COMPANY,
Des Moines, Iowa,
Defendants.

EQUITY NO.
CE 3-1300

RULING

This case was originally filed by the plaintiff on November 1, 1974, in the Polk County District Court. A hearing was held on plaintiff's Motion for Temporary Injunction on November 27, 1974, but before an actual ruling or order was signed, the defendants removed the case to the Federal District Court for the Southern District of Iowa, Central Division, on November 29, 1974. On October 9, 1975, the Honorable William C. Hanson, Chief Judge of that Court, remanded the case to the Polk County District Court. On October 23, 1975, a hearing was held on plaintiff's Motion for Temporary Injunction before this Court. At the hearing the parties stipulated that the case would be argued and briefs would be submitted to the Court on the full merits and that the plaintiff would forego his request for a temporary injunction. It was stated by counsel for First of Omaha Service

APPENDIX E

Corporation, that if it were ultimately determined that the finance charge being assessed to Iowa residents who have Bank Americards from the First National Bank of Omaha was illegal, any excess charge collected after October 25, 1975, would be credited to the customer's account or refunded. He also stated that excess interest obtained before October 25 would be similarly credited or refunded if the amount of the excess could be determined. Briefs have been filed for the plaintiff by Julian B. Garrett, Assistant Attorney General, and for the defendants by their attorneys, William E. Morrow, David G. Scott, and Kenneth L. Butters.

FINDINGS OF FACT

The Bank Americard plan is a national and international bank credit card system which enables card holders to purchase goods and services on credit from participating merchants throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank located in Omaha, Nebraska, is a card issuing member in the Bank Americard plan, and as such has issued cards to Iowa residents who qualify for them.

First of Omaha Service Corporation is a wholly owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska, but it is authorized to transact business in the State of Iowa and does transact business in the State of Iowa. Central National Bank & Trust is a national bank located in Polk County, Iowa.

First of Omaha Service Corporation participates in the system by entering into agreements with merchants and banks in Iowa which govern their partic-

ipation in the system. Central National is one such Iowa bank with which First of Omaha Service Corporation has entered into an agreement. By virtue of this agreement, Central National, though it does not have authority to issue cards or extend credit directly in connection with Bank Americard transactions, does advertise the Bank Americard plan and solicit applications for Bank Americards which are then forwarded to First National for acceptance or rejection, and it serves as a depository for Bank Americard sales forms deposited by participating merchants with whom First of Omaha Service Corporation has member agreements.

Iowa card holders wishing to purchase goods and services or obtain cash loans, sign a Bank Americard form which is authenticated by the card holder's Bank Americard credit card, and exchange the signed form for goods or services or cash from the merchant or bank respectively. These forms are then deposited by the participating merchant in his account with Central National Bank or a similarly functioning bank which then forwards them to First National Bank of Omaha.

The First National Bank of Omaha renders periodic statements to its Iowa card holders and charges interest on the unpaid balance of the card holder's account. This interest is assessed at the rate of 1½% per month on the first \$999.99 of the customer's account for an annual percentage rate of 18% and 1% per month on amounts of \$1,000 and more for an annual percentage rate of 12%. The defendants are paid for their services but they do not directly receive interest except that the First of Omaha Service Corporation does accept assignments of delinquent

accounts and as an incident to collecting these accounts does collect interest.

The finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases before deducting any payments made during the current billing cycle.

The plaintiff is asking for a Permanent Injunction restraining the defendants from participating in the Bank Americard program being operated by the First National Bank of Omaha while Iowa customers of that bank are being assessed a finance charge in excess of 1½% per month on the first \$500 of their account and 1¼% per month on any amount in excess of \$500 as required by the provisions of Chapter 537, Code of Iowa, 1975, commonly referred to as the **Iowa Consumer Credit Code**, and hereinafter referred to as the ICCC. The plaintiff also claims that the First National Bank of Omaha is violating the ICCC in assessing a finance charge on the total previous balance of a customer's account without deducting any payments or credits made during that billing cycle.

CONCLUSIONS OF LAW

This case involves the interaction of the interest rate sections of the National Banking Act found in 12 U.S.C., §85 and the **Iowa Consumer Credit Code**, Chapter 537, Code of Iowa, 1975. The policy of the **National Banking Act** is to give national banks competitive equality with other lenders but not to give national banks competitive superiority over all other lenders. **First National Bank in Mena v. Nowlin**, 509

F.2d 872, 8th Cir., (1975) pgs. 879 & 880. The **National Banking Act** should be construed liberally to achieve this purpose.

It is clear that on open-end consumer loans made to Iowa residents by Iowa lenders, the maximum finance charge is 18% per year on the first \$500 of the loan and 15% per year on any amount exceeding \$500 (§537.2402[3], Code of Iowa, 1975). That same finance charge ceiling is also imposed on non-Iowa non-national bank lenders who are making open-end consumer loans to residents of the State of Iowa (§537.1201[1][a] and §537.1201[2][b], Code of Iowa, 1975. See also **Aldens, Inc. v. Packel**, 524 F.2d 38, a Third Circuit Court of Appeals case upholding the constitutionality of a Pennsylvania law imposing Pennsylvania's interest rate ceilings on out-of-state creditors.)

The defendants insist in their brief that the interest rate restrictions imposed by the State of Nebraska on lenders making loans to Nebraska residents should apply to loans made by national banks located in Nebraska. They argue that it makes no difference whether the borrower is a resident of Nebraska, Iowa, or some other state.

However, where national banks are making loans to residents of other states, a blind requirement that a national bank always is subject to the interest rate laws of the State of its domicile can defeat the policy of competitive equality rather than further it.

As applied to Iowa this policy would give national banks from states with higher interest rates than Iowa a competitive advantage. On the other hand, national banks located in other states who impose

a lower interest rate ceiling than does the State of Iowa would be put at a competitive disadvantage in making loans to Iowa residents.

The defendant's argument that national banks are in all situations permitted to charge a finance charge equal to the rate permitted in that state on loans made to residents of that state, and no more, defeats the purpose of the **National Banking Act**.

The intent of the **National Banking Act** is to allow national banks to charge an interest rate equal to that which other lenders are allowed to charge on the particular kind of loan being made. Since non-national bank lenders located in Nebraska are not permitted under applicable Iowa law or Nebraska law to charge a rate in excess of that permitted by the ICCC when making loans to Iowa residents (see **Aldens**, supra), it follows that national banks located in Nebraska are not permitted to do so either. There is no special provision in federal law, Iowa law, or Nebraska law that has been pointed out to this Court which would allow a national bank to charge interest higher than that allowed to any other lender for that particular type of loan. In fact, the law clearly ties the interest rate allowed to a national bank to the interest rate allowed to other kinds of lenders.

To specifically respond to the legal issues raised by the defendants, it is the ruling of this Court that:

A. It is necessary for the plaintiff to show that the First National Bank of Omaha exacts an unlawful rate of interest in connection with its Bank Americard transactions with Iowa residents in order to sustain the conspiracy theory alleged by the plaintiff. If the

rate exacted by the First National Bank is unlawful, then the close relationship and cooperation towards a common end that is shown by the facts to exist between the two defendants and the First National Bank of Omaha does sustain plaintiff's conspiracy theory and is sufficient to hold the two defendants responsible for the illegal acts.

B & C. It is the ruling of the Court that as a matter of law, the finance charge which may be assessed by the First National Bank of Omaha in making open-end consumer loans to Iowa residents is limited by the rate ceilings of the ICCC as are the finance charges which can be assessed by non-national bank lenders located in Iowa or Nebraska in making loans to Iowa residents.

D. It is the ruling of this Court that as a matter of law, there is no conflict between the ICCC and the Constitution of the United States and particularly Article 1(8) and (10), and Article 6. **Aldens, Inc. v. Packel**, supra, holds that similar provisions of the law of the State of Pennsylvania are constitutional when applied to a creditor who has much less contact with the State of Pennsylvania than the First National Bank of Omaha and the two defendants herein have with Iowa. The only difference between the cases is that in this case the main creditor is a national bank which **Aldens** is not. However, as this Court has stated, it can find no basis for permitting a national bank to assess a finance charge greater than any other lender is allowed to charge.

It is the ruling of this Court that the activities of the defendants herein are subject to an injunction at the quest of the Attorney General of Iowa. **Jackson**

v. **First National Bank of Valdosta**, 349 F.2d 71, 5th Cir., (1965) p. 74.

Plaintiff's second contention is that the First National Bank of Omaha is in violation of the ICCC when it assesses a finance charge on the total previous balance of its Iowa customers' accounts without deducting any payments or credits during that current billing cycle. Section 537.2402(2) prohibits this method of assessing the finance charge. This section requires that all payments and credits made during the billing cycle for which the finance charged is being assessed be deducted before assessing that finance charge except credits attributable to purchases charged to the account during the cycle. For the same reasons that the interest rate ceilings of the ICCC apply to these Bank Americard transactions, this section also applies. It is unlawful for the First National Bank of Omaha to assess a finance charge on the balance at the beginning of a given billing cycle without deducting credits and payments made during that billing cycle as required by the ICCC provision just cited.

It is the ruling of the Court that injunction should issue restraining the defendants from doing acts to further the Bank Americard program being conducted by the First National Bank of Omaha in the State of Iowa so long as Iowa residents are charged a finance charge in excess of $1\frac{1}{2}\%$ per month or 18% per year on the first \$500 of their account and $1\frac{1}{4}\%$ per month or 15% per year on balances in excess of \$500, or while the First National Bank of Omaha is assessing its finance charge on the balance owing at the beginning of its billing cycle without deducting payments or credits made during the bill-

ing cycle.

The Court would invite both the plaintiff and the defendants to submit any suggestions they may have as to the wording of such an injunction.

Dated this 3rd day of September, 1976.

Harry Perkins
JUDGE, FIFTH JUDICIAL DISTRICT OF IOWA

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United States Code, Title 12, §86

86. *Usurious interest — Penalty for taking — Statute of limitation.* —The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [§85 of this title], when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided such action is commenced within two years from the time the usurious transaction occurred.

Act of June 3, 1864, c. 106, § 30, 13 Stat. 108; R. S. 5198

IOWA BANKING ACT

1966 Code of Iowa, §529.2

529.2 Lending agency. All banks operating under this title are authorized to make installment loans as provided in this chapter. The provisions of this chapter, so far as they are applicable, shall also apply and extend to national banks operating in this state, if such banks avail themselves of the provisions of this chapter. [C46, 50, 54, 58, 62, §529.2]

1971 Code of Iowa, §524.906

524.906 Installment loans by state banks.

1. A state bank may contract for and receive on any loan which is evidenced by a written agreement for repayment in installments, a charge, which shall include interest, determined in accordance with either of the following methods:

a. At a rate not to exceed six dollars per annum upon each one hundred dollars actually loaned to the customer. In addition to the amount actually loaned, the charge may be included in the total amount of the loan. The terms of any loan for which a charge is made pursuant to this paragraph shall require substantially equal installments at successive intervals of not more than one year in amounts sufficient to amortize the entire loan, including charges, within a period of not more than five years provided, however, that the first installment may be deferred to not more than fifteen months from the date of the loan.

b. At a rate not to exceed one percent per month

APPENDIX G

computed on unpaid principal balances. A state bank may receive such charge by crediting each installment whenever received, first to the charge at the monthly rate contracted for and the remainder to principal until the loan is fully paid, or the state bank may compute the total charge which would be earned at the monthly rate contracted for if the loan were repaid according to its terms and each installment were applied first to the charge and then to principal, and include such total charge in the total amount of the loan. The terms of any loan for which a charge is made pursuant to this paragraph shall require substantially equal installments at successive intervals of not more than one month in amounts sufficient to amortize the entire loan, including charges, within the period ending on the date of its maturity which shall not exceed five years provided, however, that installments may be deferred or omitted on a seasonal basis. If the total charge is included in the total amount of the loan as provided for in this paragraph, a first interval of not less than fifteen nor more than forty-five days may be treated as a monthly interval.

2. If the charge determined in accordance with subsection 1 of this section is less than ten dollars, a state bank may contract and receive a charge of not more than ten dollars, which charge shall be in lieu of any charge determined in accordance with subsection 1 of this section and shall not be subject to refund as required by subsection 5 of this section.

3. No further amount shall be charged, contracted for or received, directly or indirectly, on or in connection with any loan subject to the provisions of

this section, except fees paid for filing documents in public offices in connection with the loan, actual expenditures, including reasonable attorney's fees for proceedings to collect the loan, and the cost of a reasonable amount of insurance of the kind customarily required, but not in excess of standard insurance rates.

4. When an installment is not paid when due, a state bank may collect a single delinquency charge, in an amount not to exceed five percent of the installment, for each installment in arrears for a period of more than ten days, provided that the delinquency has not been caused by reason of acceleration or by reason of delinquency on a prior installment.

5. Any payment in cash made by a customer before maturity shall be accepted by the state bank. When full payment of a loan subject to the provisions of this section is made before maturity, whether by payment in cash, renewal or otherwise, or whenever the maturity of the loan is accelerated, the customer shall receive from the state bank at the time the loan is paid in full a refund of the unearned charge. The refund shall be so calculated that the customer will not have paid a charge for the loan at a greater rate when computed on actual unpaid principal balances than the customer would have paid had the loan been permitted to run to its maturity, and in no event shall the customer be required to pay in excess of one percent per month interest on the actual unpaid principal balances. All such refunds shall be made in accordance with a uniform refund schedule calculated, prescribed and approved by the superintendent.

6. The total amount loaned to any one customer for which a charge is made pursuant to this section shall not, at any one time, exceed ten thousand dollars excluding charges permitted by this section. For any portion of one or more loans to one customer in excess of ten thousand dollars, the charge which the state bank may make shall be governed by law other than this section. No state bank shall have outstanding loans subject to this section in an aggregate amount exceeding twenty-five percent of its total assets.

7. The provisions of this section, nor insofar as loans described in paragraph "b" of this subsection are concerned, the provisions of any other section of the laws of this state, shall not apply to loans, evidence of indebtedness or agreements for the payment of money which:

- a. Are secured by first liens on real property.
- b. Are real property improvement loans insured, all or in part, by the federal housing administration under the laws of the United States.
- c. Are the obligations of a customer which is a corporation.
- d. Have been acquired by the state bank by purchase or discount from the person owning the same. [C46, 50, 54, 58, 62, 66, §§529.1, 529.3, 529.4, 529.6-529.8, 529.10; 63GA, ch 273§906]

1966 Code of Iowa, §529.6

529.6 Maximum charge. All banks operating under the provisions of this chapter may contract for and receive on any loan, excluding charges, which is

repayable in installments, a maximum charge (which shall include interest) determined in accordance with either of the following options:

Option A. The total charge on any such installment loan shall be at a rate not to exceed six dollars per annum upon each one hundred dollars actually loaned to the borrower. Said charge may be included in the face amount of the note, in addition to the amount loaned or advanced. Said charge shall include and be in lieu of any interest, or charge for credit investigation, drawing papers, or any other service charge incidental to making, carrying or servicing said loan.

Option B. The total charge may be any amount not exceeding the equivalent of one percent per month computed on unpaid principal balances. The bank may receive such charge by crediting each payment whenever received, first to the charge at the monthly rate contracted for, and the remainder to principal until the loan is fully paid; or the bank may compute the total charge which would be earned at the monthly rate contracted for if the loan contract were repaid according to its terms and each payment were applied first to the charge and then to principal, and include such total charge in the face of the note.

If the total charge is included in the face of the note pursuant to either Option A or B of this section, and the period of the loan contract is divided into monthly intervals, a first interval of not less than fifteen nor more than forty-five days may be treated as a monthly interval.

In addition to the total charge permitted by this

section, no further amount shall be directly or indirectly charged, contracted for, or received on or in connection with any loan made under this chapter, except lawful fees paid to a public officer, adjudged and statutory taxable costs, and the cost of a reasonable amount and kind of insurance customarily required, but at not in excess of standard insurance rates. The borrower shall be free to obtain his insurance from any agent or broker of his own choosing. [C46, 50, 54, 58, 62, §529.6]

CHATTEL LOANS (SMALL LOANS)

1966 and 1971 Code of Iowa, §536.13(4) and (6)

536.13 Banking Board — report — additional restrictions

4. Beginning July 4, 1965, and until such time as a different rate is fixed by the board, the maximum rate of interest or charges upon such class or classes of small loans shall be three percent per month on any part of the unpaid principal balance of the loan not exceeding one hundred and fifty dollars and two percent per month on any part of the loan in excess of one hundred fifty dollars, but not exceeding three hundred dollars, and one and one-half percent per month on any part of the unpaid principal balance of the loan in excess of three hundred dollars, but not exceeding seven hundred dollars, and one percent per month on any part of the unpaid principal balance of the loan in excess of seven hundred dollars.

6. The following provisions shall apply to any or all loans in the amount or of the value of one thous-

and dollars or less made by any licensee hereunder:

Interest shall not be paid, deducted or received in advance; shall not be compounded; shall be computed only on unpaid principal balances for the number of days actually elapsed and for the purpose of such computations a month shall be any period of thirty consecutive days, but interest may be precomputed as provided in subsection 7 of this section. If part or all of the consideration for a loan contract is the unpaid principal balance of a prior loan with the same licensee, then the principal amount payable under such loan contract may include the amount due on a precomputed contract after giving the rebate required by subsection 7 of this section. No licensee shall induce or permit any borrower or borrowers to split up or divide any loan or loans for the purpose of evading any provision of this chapter nor shall any licensee knowingly permit any borrower nor any husband and wife individually or together, to be indebted to him under more than one contract of loan at the same time. In addition to the rates of interest or charges herein provided for no further or other charge for examination, service, brokerage, commission, expense, fee, or bonus or other thing shall be directly or indirectly charged, contracted for, or received, except the lawful fees, if any, actually and necessarily paid out by the licensee to any public officer, for filing or recording or releasing in any public office any instrument securing the loan, which fees may be collected when the loan is made, or at any time thereafter. If any interest or charges in excess of these permitted by this chapter are charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no

right to collect or receive any principal, interest, or charges whatsoever.

1966 and 1971 Code of Iowa, §536.14

536.14 Statement given borrower — payments. Every licensee shall:

1. Deliver to the borrower at the time any loan is made a statement (upon which there shall be printed a copy of subsections 1, 5, and 6 of section 536.13) in the English language showing in clear and distinct terms the lawful maximum rate or rates of interest or charges in effect, the amount and date of the loan and of its maturity, the nature of the security, if any, for the loan, the name and address of the borrower and of the licensee, and the agreed rate of charge. When the loan is made pursuant to subsection 7 of section 536.13, the statement shall also contain a notice that default and deferment charges may be made and that a rebate of unearned interest may be made if the loan is prepaid prior to maturity.

2. Give to the borrower a plain and complete receipt for all payments made on account of any such loan at the time such payments are made, specifying the amount applied to interest or charges and the amount applied to principal; provided, however, if the interest has been precomputed the receipt need not be itemized and no receipt shall be required where payment is made by check or money order and the full amount of such check or money order is applied to the loan.

3. Permit payment to be made in advance in any amount on any contract of loan at any time, but the licensee may apply such payment first to all interest or charges up to the date of such payment.

4. Upon repayment of the loan in full, mark indelibly every obligation and security other than a mortgage* signed by the borrower with the word "paid" or "cancelled", and release any security interest which no longer secures a loan to the licensee, restore any collateral, return any note and any assignment given to the licensee by the borrower.

5. Display prominently in each licensed place of business an accurate schedule, to be approved by the superintendent, of the charges currently to be made upon all loans. [C24, 27, 31, §9425; C35, §9438-f14; C39, §9438.14; C46, 50, 54, 58, 62, §536.14; 61GA, ch 409, §§11, 12, 13(1, 2), ch 413, §10117]

1966 and 1971 Code of Iowa, §536.15

536.15 Usury — limitation on principal loan. No licensee shall directly or indirectly charge, contract for, or receive any interest or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or sale of credit, of the amount or value of more than one thousand dollars. The foregoing prohibition shall also apply to any licensee who permits any person, as borrower or as indorser, guarantor, or surety for any borrower, or otherwise, to owe directly or contingently or both to the licensee at any time the sum of more than one thousand dollars for principal. [C24, 27, 31, §9424; C35, §9438-f15; C39, §9438.15; C46, 50, 54, 58, 62, §536.15; 61GA ch 409, §5(1, 2)]

1966 and 1971 Code of Iowa, §536.20

536.20 Nonapplicability of statute. This chapter

shall not apply to any person doing business under and as permitted by any law of this state or of the United States relating to banks, trust companies, building and loan associations, credit unions or licensed pawnbrokers, nor shall it apply to any domestic corporation entitled to the benefits of chapter 536A. [C35,§9438-f20; C39,§9438.20; C46 50, 54, 58, 62, 66,§536.20; 63GA, ch 273,§1855; 63GA, ch 1254,§1]

Ruling of the Comptroller of the Currency, 12 C.F.R. 7.7310

Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.

(a) A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law, relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company or Morris plan bank, without being so licensed.

(b) A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.

DEC 22 1976

No. 76-716

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

FRED FISHER,

Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
I. The Decision Below Is A Straightforward Interpretation Of Section 85 Of The National Bank Act, Consistent With Numerous Other Interpretations Of Similar Language Elsewhere In The Act, And Is Not An Appropriate Decision For This Court To Review	3
II. There Are Other Grounds Supporting The Decision Below, Which Further Militate Against A Grant Of The Writ	6
CONCLUSION	10
APPENDIX	

TABLE OF AUTHORITIES

Cases

	PAGE
<i>American Security Co. v. Bank of California</i> , 133 F.2d 160 (9th Cir. 1943)	5
<i>Arnold v. Potter</i> , 22 Iowa 194 (1867)	7
<i>Bank of America v. Whitney Central Nat'l Bank</i> , 261 U.S. 171 (1923)	4
<i>Bigelow v. Burnham</i> , 83 Iowa 120, 49 N.W. 104 (1891) ..	7
<i>Blackford v. Commercial Credit Corp.</i> , 263 F.2d 97 (5th Cir.), cert. denied, 361 U.S. 825 (1959)	7
<i>Buffum v. Chase Nat'l Bank</i> , 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952)	4
<i>Burns v. American Nat'l Bank & Trust Co.</i> , 479 F.2d 26 (8th Cir. 1973)	3, 9
<i>Butters v. Olds</i> , 11 Iowa 1 (1860)	7
<i>Commissioner v. First Nat'l Bank</i> , 300 A.2d 685 (Md. Ct.App. 1973)	8
<i>Consolidated Jewelers, Inc. v. Standard Fin. Corp.</i> , 325 F.2d 31 (6th Cir. 1963)	7
<i>Cupo v. Community Nat'l Bank & Trust Co.</i> , 438 F.2d 108 (2d Cir. 1971)	9
<i>Ex parte Jones</i> , 164 U.S. 691 (1897)	9
<i>Fahs v. Martin</i> , 224 F.2d 387 (5th Cir. 1955)	7
<i>First Nat'l Bank v. Nowlin</i> , 509 F.2d 872 (8th Cir. 1975) ..	6, 8
<i>Fisher v. First Nat'l Bank</i> , 538 F.2d 1284 (7th Cir. 1976)	3, 4, 5, 6
<i>Helco, Inc. v. First Nat'l Bank</i> , 470 F.2d 883 (3d Cir. 1972)	4
<i>Iowa ex rel. Turner v. First of Omaha Service Corp.</i> , Equity No. CE 3-1300 (Polk Cty. Dist. Ct. 1976) ...	6
<i>Klein v. Bower</i> , 421 F.2d 338 (2d Cir. 1970)	4
<i>Leather Mfrs.' Bank v. Cooper</i> , 120 U.S. 778 (1887) ...	9
<i>Leonardi v. Chase Nat'l Bank</i> , 81 F.2d 19 (2d Cir.), cert. denied, 298 U.S. 677 (1936)	4

	PAGE
<i>Meadow Brook Nat'l Bank v. Recile</i> , 302 F.Supp. 62 (E.D. La. 1969)	5
<i>National City Bank v. Domenech</i> , 71 F.2d 13 (1st Cir. 1934), aff'd, 294 U.S. 199 (1935)	5
<i>Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.</i> , 464 F.2d 855 (6th Cir. 1972)	8
<i>Partain v. First Nat'l Bank</i> , 336 F.Supp. 65 (M.D. Ala. 1971), rev'd on other grounds, 467 F.2d 167 (5th Cir. 1972)	8, 9
<i>Petri v. Commercial Nat'l Bank</i> , 142 U.S. 644 (1892) ..	9
<i>Radzanower v. Touche, Ross & Co.</i> , 48 L.Ed.2d 540 (1976)	4, 6, 8
<i>Seeman v. Philadelphia Warehouse Co.</i> , 274 U.S. 403 (1927)	7
<i>Tiffany v. National Bank of Missouri</i> , 85 U.S. 409 (1873)	2, 8, 9
<i>United States Nat'l Bank v. Hill</i> , 434 F.2d 1019 (9th Cir. 1970)	4

Statutes and Regulations

12 C.F.R. § 7.7310	8
Ill. Rev. Stat. ch. 74, § 4.2	4
Iowa Code Anno. § 537.1201(6) (a)	7
Iowa Code Anno. § 554.1105	7
12 U.S.C. § 36	9
12 U.S.C. § 85	3
12 U.S.C. § 94	3, 4
12 U.S.C. § 548	5
28 U.S.C. § 1331	10
28 U.S.C. § 1332	10
28 U.S.C. § 1337	9
28 U.S.C. § 1348	5, 9

Miscellaneous

Restatement (Second) of Conflict of Laws § 203, Comment b (1971)	7
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No. 76-716

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

FRED FISHER,

Petitioner,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The petition presents the two following questions:*

1. Does Section 85 of the National Bank Act, which expressly provides that a national bank may charge the rate of interest allowed by the state in which it is located, permit a national bank located in Chicago, Illinois, to make loans to Iowa residents at the rate of interest allowed by the laws of the state of Illinois?

* As explained at pp. 9-10, *infra*, a grant of the writ may also entail consideration of a jurisdictional question that petitioner has failed to identify adequately.

2. Should the Court accept petitioner's implicit invitation to overturn *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873), where it held (a) that a national bank may charge the highest rate of interest allowed on a specified class of loans by the state in which the bank is located and (b) that a national bank is not limited to the maximum rate of interest allowed state banks when other lenders are allowed a higher rate?

STATEMENT OF THE CASE

In June, 1969, petitioner, Fred Fisher, a resident of Iowa, received a credit card issued by respondent, The First National Bank of Chicago, a national banking association located in Chicago, Illinois. Fisher accepted the card and used it numerous times to obtain credit from the Bank pursuant to the terms of the agreement that was enclosed with the card when he received it. Among other things, the cardholder agreement provided:

"10. This Agreement is made in Illinois and the validity, construction and enforcement of this Agreement and all matters arising out of the issuance and use of FirstCard shall be governed by the law of Illinois."

Fisher used his card to obtain credit in the total amount of \$530.63 and accumulated finance charges of \$97.30 (at the disclosed rate of 1½% per month of the unpaid principal balance) during the eighteen months that his account was active. Also during that time, the Bank mailed Fisher monthly statements from Chicago, and Fisher made sporadic payments to the Bank in Chicago, totaling \$221.81, of which \$91.39 was applied to interest.

As of January 3, 1971, Fisher's account showed an unpaid balance of \$406.12, of which \$400.21 represented principal. Thereafter, without any prior notice or complaint to the

Bank, Fisher failed to make any further payment on his outstanding balance.

This action followed and was originally filed by Fisher in the United States District Court for the Southern District of Iowa. After the Bank's challenge to subject matter jurisdiction was denied by a divided United States Court of Appeals for the Eighth Circuit, sitting en banc,* the case was transferred to the Northern District of Illinois pursuant to the national bank venue statute, 12 U.S.C. § 94. Subsequently, on June 13, 1975, the district court dismissed the complaint for failure to state a claim upon which relief could be granted. (App. B). The judgment was affirmed on appeal, 538 F.2d 1284 (7th Cir. 1976) (App. A), and on August 31, 1976, Fisher's petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS A STRAIGHTFORWARD INTERPRETATION OF SECTION 85 OF THE NATIONAL BANK ACT, CONSISTENT WITH NUMEROUS OTHER INTERPRETATIONS OF SIMILAR LANGUAGE ELSEWHERE IN THE ACT, AND IS NOT AN APPROPRIATE DECISION FOR THIS COURT TO REVIEW.

This case turns on the meaning of Section 85 of the National Bank Act, which provides that a national bank may charge "on any loan . . . interest at the rate allowed by the laws of the State, Territory or District where the bank is located. . . ." 12 U.S.C. § 85. (Emphasis supplied.) On the basis of this unambiguous statutory language, the court of appeals held that the Bank, indisputably located in Illinois, could charge the interest rate allowed by the laws of Illinois

* *Sub nom Burns v. American Nat'l Bank & Trust Co.*, 479 F.2d 26 (8th Cir. 1973) (App. C). Certiorari was not sought by the Bank. (Unless otherwise indicated, the appendices referred to herein are those appended to the petition.)

on a specified class of loans, even though the borrower was an Iowa resident.

There has never been any dispute in the lower courts that Section 85 is the governing statute or that the Bank's interest rate is lawful under the Illinois Revolving Credit Act, Ill. Rev. Stat. ch. 74, § 4.2. The only controversy has been the meaning of the phrase "State . . . where the bank is located." Fisher has urged that the Bank is "located" wherever its customers happened to reside, an argument understandably rejected below:

"[T]here can certainly be no lingering doubt as to the meaning of 'where the bank is located'. . . . The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois." 538 F.2d at 1289.

In reaching this conclusion, the court relied in part on the recent decision in *Radzanower v. Touche, Ross & Co.*, 48 L.Ed.2d 540 (1976), where, in interpreting 12 U.S.C. § 94, this Court noted that:

"Federal courts have consistently ruled that the place specified in a bank's charter as its home office is determinative of the district in which the bank is 'established'. . . ." *Id.* at 545 n.2.*

The court below also explained that there has never

* This Court cited as examples: *Buffum v. Chase Nat'l Bank*, 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952), and *Leonardi v. Chase Nat'l Bank*, 81 F.2d 19, 22 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936). Similar decisions include *United States Nat'l Bank v. Hill*, 434 F.2d 1019, 1020 (9th Cir. 1970); *First Nat'l Bank v. United States District Court*, 468 F.2d 180, 182-83 (9th Cir. 1972); *Helco, Inc. v. First Nat'l City Bank*, 470 F.2d 883, 884 (3d Cir. 1972); *Bank of America v. Whitney Central Nat'l Bank*, 261 U.S. 171, 172-73 (1923); and *Klein v. Bower*, 421 F.2d 338, 342 (2d Cir. 1970).

been any suggestion that "Congress gave one meaning to 'locate' in § 94 and another meaning to the same word in § 85." 538 F.2d at 1289. Moreover, the term "located" has been similarly construed wherever it appears in the National Bank Act or in other statutes concerning national banks. See *National City Bank v. Domenech*, 71 F.2d 13, 16 (1st Cir. 1934), *aff'd*, 294 U.S. 199 (1935) (concerning taxation of national banks, 12 U.S.C. § 548); *American Security Co. v. Bank of California*, 133 F.2d 160, 161-62 (9th Cir. 1943) (concerning federal jurisdiction over national banks under Section 41(16) of the Judicial Code, now 28 U.S.C. § 1348).

Fisher wrongly cites *Meadow Brook Nat'l Bank v. Recile*; 302 F.Supp. 62 (E.D. La. 1969), as supporting a contrary interpretation. That case involved a loan made by a national bank located in New York to a Louisiana company. The court's analysis of Section 85 was entirely consistent with the decision below, as the court explained:

"The plaintiff bank is located in the State of New York. Thus, if § 85 is applicable to this case, we must refer to New York law to determine the maximum interest rate.

. . .

"[I]f 12 U.S.C. § 85 is applicable, it leaves no room for the operation of the laws of this state [Louisiana] as to the interest rate." *Id.* at 72, 73.

However, for unexplained reasons, the court went on to hold that the National Bank Act does not apply at all to loans made by a national bank to residents of other states. The court thereupon applied both the Louisiana interest law and its remedies, but subsequently vacated its decision and ordered a new trial. (A copy of the unpublished order granting the new trial is appended hereto.)

In this case, Fisher has never urged that Section 85 is inapplicable and indeed sued under Sections 85 and 86. Thus, the only aspect of *Recile* that has any bearing on the issues in this case is the court's analysis of Section 85. Since that analysis is contrary to Fisher's position and is consistent with the decision below, it demonstrates that there is no conflict among the lower federal courts for this Court to resolve.

At bottom, Fisher is asking this Court to engage in judicial legislation. This is precisely what the court below declined to do when it stated that it would not "twist the plain meaning of the statute." 538 F.2d at 1290. That result is completely in accord with the proper role of the judiciary in interpreting congressional enactments, as exemplified by this Court's own decision in *Radzanower*.*

II. THERE ARE OTHER GROUNDS SUPPORTING THE DECISION BELOW, WHICH FURTHER MILITATE AGAINST A GRANT OF THE WRIT.

The decision below made it unnecessary for the court to consider the law of Iowa in detail. It is clear, however, that ascertaining the rate of interest *allowed* by a state requires more than reading its banking statutes; it is necessary to review other state law, common as well as statutory, including relevant choice of law principles. See *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975). In this case, Iowa would have adopted Illinois' Revolving Credit

* The recent decision of a state court judge in *Iowa ex rel. Turner v. First of Omaha Service Corp.*, Equity No. CE 3-1300 (Polk Cty. Dist. Ct. 1976), is an example of such judicial law-making. The most noteworthy aspect of the opinion (petitioner's Appendix E) is that it nowhere even discusses the language of Section 85; hence, it is of no precedential interest here. Moreover, on September 7, 1976, the Polk County, Iowa, District Court vacated its September 3, 1976, order and granted a new trial in order to reconsider its prior ruling.

Act under its law recognizing both the principle of contractual agreement specifying the law to govern, *Butters v. Olds*, 11 Iowa 1 (1860); *Arnold v. Potter*, 22 Iowa 194, 199-201 (1867); Iowa Code Anno. § 554.1105 (Uniform Commercial Code choice of laws provision), and the doctrine of validation, which upholds an interest rate for an interstate loan if the rate is allowed by either of the states involved. *Bigelow v. Burnham*, 83 Iowa 120, 49 N.W. 104 (1891).

These principles have long been recognized in the federal courts. In *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407 (1927), the Court stated:

"Respondent, a Pennsylvania corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Pennsylvania in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed."

See also *Consolidated Jewelers, Inc. v. Standard Fin. Co.*, 325 F.2d 31, 33-34 (6th Cir. 1963); *Fahs v. Martin*, 224 F.2d 387, 397 (5th Cir. 1955); *Blackford v. Commercial Credit Corp.*, 263 F.2d 97, 113 (5th Cir.), *cert. denied*, 361 U.S. 825 (1959); Restatement (Second) of Conflict of Laws § 203, Comment b (1971).

Although Fisher has simply ignored these principles, any review of the decision below would inevitably require this Court to determine whether long-established choice of law principles in Iowa should be reversed. Moreover, such a determination would apply to this case, and this case only, because four years after the transactions that are the subject of this case Iowa modified its choice of law principles through legislation. Code of Iowa Anno. §§ 537.1201(6)(a) (Uniform Consumer Credit Code).

Furthermore, even under Iowa's interest statutes the judgment below would be sustained. Fisher's argument has always been premised on the notion that the Bank could only charge the maximum interest rate that Iowa state banks may charge. But for more than a century, Section 85 has been understood to mean that national banks may charge the highest rate of interest allowed *any* lender in the state on the same specified class of loan. *Tiffany v. National Bank of Missouri*, 85 U.S. 409 (1873). In *Tiffany*, the Court expressly held that the National Bank Act "does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks." *Id.* at 412. (Emphasis supplied.) This Court has never departed from that holding, which has been applied through the years and which permits national banks to charge the same interest rates as savings and loan associations and small loan companies, *E.g.*, *First Nat'l Bank v. Nowlin*, *supra*; *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 861-64 (6th Cir. 1972); *Partain v. First Nat'l Bank*, 336 F. Supp. 65, 66-67 (M.D. Ala. 1971), *rev'd on other grounds*, 467 F.2d 167 (5th Cir. 1972); *Commissioner v. First Nat'l Bank*, 300 A.2d 685, 687-90 (Md. Ct.App. 1973).

In fact, *Tiffany* has been expressed in a regulation promulgated by the Comptroller for the Currency, 12 C.F.R. § 7.7310, and has been reiterated in more than eighty rulings by the Comptroller since 1933. *Commission v. First Nat'l Bank*, 300 A.2d 685, 690-91 (Md. Ct. App. 1973). During this time, Congress has not seen fit to amend Section 85 despite numerous other amendments to the National Bank Act, a point of no little significance. See *Radzanower v. Touche, Ross & Co.*, 48 L.Ed.2d at 549 n.16.

Fisher has never argued that the Bank's rate of interest was not consistent with the rate provided by the Iowa Small Loan Act, urging instead that *Tiffany* and

its progeny should be discarded. His premise is that the National Bank Act requires absolute "competitive equality" between national and state banks, and for that proposition he relies on branch banking cases under the McFadden Act, 12 U.S.C. § 36, which embodies principles and policies of its own and which in no way addresses or undermines the *Tiffany* doctrine.* The absence of any judicial or legislative support for petitioner's position for more than one hundred years strongly militates against granting the writ.

Finally, this Court should not take up the questions pressed by Fisher because federal jurisdiction in this case is doubtful. The Court of Appeals for the Eighth Circuit held that jurisdiction rested on 28 U.S.C. § 1337 (commerce jurisdiction), which does not require that a jurisdictional amount be satisfied. 479 F.2d 26 (1973). (App.C). Although this view has been adopted by several circuits, *Cupo v. Community Nat'l Bank & Trust Co.*, 438 F.2d 108 (2d Cir. 1971); *Partain v. First Nat'l Bank*, 467 F.2d 167 (5th Cir. 1972), another analysis suggests that § 1337 was not intended to create federal jurisdiction over any case involving a national bank simply because of the status of the bank. Rather, 28 U.S.C. § 1348 demonstrates that a national bank was to be treated as an ordinary corporation for jurisdictional purposes. *Leather Mfrs.' Bank v. Cooper*, 120 U.S. 778, 781 (1887); *Petri v. Commercial Nat'l Bank*, 142 U.S. 644, 651 (1892); *Ex parte Jones*, 164 U.S. 691, 693 (1897). Thus, jurisdiction in a usury case should require satisfaction of the jurisdictional amount either for diversity

* It is difficult to perceive how an Iowa bank would be at a competitive disadvantage if it charged a lesser interest rate: principles of economics dictate that the Iowa bank would get the business. Moreover, the "equality" proposed by the McFadden Act is one between national banks and state banks in the *same* state in which the national banks are located. Fisher is hardly suggesting that the equality principle means that respondent is entitled to the same branching privileges in Iowa as are allowed Iowa state banks.

jurisdiction, 28 U.S.C. § 1332, or for federal question jurisdiction, 28 U.S.C. § 1331. The presence of this threshold question strongly suggests that the issues sought to be reviewed by petitioner should await a better jurisdictional and factual record before the Court determines whether the statutory issues are worthy of review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 22, 1976

APPENDIX

Minute Entry

November 24, 1969

Heebe, J.

THE MEADOW BROOK NATIONAL BANK

versus

SAM J. RECILE and

WILSON P. ABRAHAM

CIVIL
ACTION

No. 67-341

Section B

This cause came on for hearing on a previous day on the motion of the Meadow Brook National Bank for a new trial and amendment of judgment or, in the alternative, to correct a clerical mistake in the judgment, and the motion of defendant, Wilson P. Abraham, for amendment of judgment. The Court, having studied the legal memoranda submitted, having heard the arguments of counsel, and having considered all of the evidence, is now fully advised in the premises and ready to rule.

IT IS THE ORDER OF THE COURT that the motion of the Meadow Brook National Bank for a new trial, be, and the same is hereby, GRANTED.

Frederick J. R. Heebe

Jerry A. Brown, Esq.

D. D. Howard, Esq.

Moise Steeg, Jr., Esq.

Matthew F. Belin, Esq.